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In the Supreme Court of the United States

OCTOBER TERM, 1992

AMERITECH CORPORATION, ET AL.

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an alleged antitrust violator whose operations are subject to a consent decree has the power to obstruct modification of a decree provision that applies only to other private parties, even if the modification is supported by the United States, is agreed to by the restricted parties, and satisfies the "public interest" test for consensual decree modifications.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties filing briefs in the court of appeals were petitioners Ameritech Corporation, Bell Atlantic Corporation, NYNEX Corporation, Pacific Telesis Group, Southwestern Bell Corporation, and U S WEST, Inc.; BellSouth Corporation; the United States; and American Telephone & Telegraph Co. and MCI. The United States Telephone Association and GTE Corporation entered appearances in the court of appeals but did not file briefs.

Petitioners are principally in the business of providing communications services and products to the general public.

Ameritech. Ameritech Corporation is a publicly held corporation which owns the following subsidiaries which have securities in the hands of the public:

Illinois Bell Telephone Company
Indiana Bell Telephone Company, Incorporated
Michigan Bell Telephone Company
The Ohio Bell Telephone Company
Wisconsin Bell, Inc.
Telecom Corporation of New Zealand Limited

Bell Atlantic. Bell Atlantic Corporation is a publicly held corporation which owns the following subsidiaries which have securities in the hands of the public:

The Bell Telephone Company of Pennsylvania
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia
The Chesapeake and Potomac Telephone Company of West Virginia
The Diamond State Telephone Company
New Jersey Bell Telephone Company
Bell Atlantic Systems Leasing International, Inc.

Bell Atlantic Tricon Leasing Corp.
Bell Atlantic Financial Services, Inc.
Bell Atlantic Mobile Systems, Inc.
Bell Atlantic Network Funding Corp.
Bell Atlantic Capital Funding Corp.
Bell Atlantic Telecom Corporation of New Zealand Limited

NYNEX. NYNEX Corporation is a publicly held corporation. It has no publicly held parent, subsidiary or affiliate.

Pacific Telesis Group. Pacific Telesis Group is a publicly held corporation and its subsidiaries Pacific Bell and Nevada Bell have securities in the hands of the public.

Southwestern Bell. Southwestern Bell Corporation is a publicly held corporation and its subsidiaries Southwestern Bell Telephone Company and Southwestern Bell Capital Corporation have securities in the hands of the public.

U S WEST. U S WEST, Inc. is a publicly held corporation which owns the following subsidiaries which may have securities in the hands of the public:

The Mountain States Telephone and Telegraph Company
Northwestern Bell Telephone Company
Pacific Northwest Bell Telephone Company
U S WEST NewVector Group, Inc.
U S WEST Capital Funding, Inc.
U S WEST Financial Services, Inc.
BetaWEST Properties, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Six regional Bell Telephone Companies (Ameritech Corp., Bell Atlantic Corp., NYNEX Corp., Pacific Telesis Group, Southwestern Bell Corp., and U S WEST, Inc.) petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-41a) is reported at 969 F.2d 1231. The opinion of the district court (App., *infra*, 44a-53a) is reported at 131 F.R.D. 647. The opinion of the district court denying reconsideration (App., *infra*, 54a-56a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1992. On October 14, 1992, Chief Justice Rehnquist extended the time for filing a petition for writ of

certiorari to November 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

DECREE PROVISIONS

The AT&T consent decree is reprinted at App., *infra*, 62a-77a.

STATEMENT

This case raises a recurring and exceptionally important issue of federal law concerning the government's authority to modify an antitrust consent decree whose provisions have themselves become anticompetitive. Under established legal principles, if both the Department of Justice and the antitrust defendants subject to a restriction in a consent decree seek to modify that restriction, the district court must accept the modification provided it falls within the reaches of the public interest. The issue in this case is whether the objection of a decree signatory *that is neither bound by, nor an intended beneficiary of*, the relevant decree restriction nonetheless has the power to block the modification.

The issue arises under the antitrust consent decree that governs the Nation's telecommunications industry. AT&T, the original defendant in this antitrust suit and the alleged antitrust violator, was permitted by the court below effectively to veto a decree modification that was agreed to by the Justice Department and the independent Bell Companies and that is necessary to improve competition and efficiency throughout the Nation's telephone system. The decision potentially affects the administration and enforcement of numerous multi-party consent decrees in a wide range of contexts, including civil rights, environmental law, and labor law.

1. *The AT&T Consent Decree*

In 1974, the federal government filed an antitrust suit against AT&T and its affiliates. The government's case centered on claims that AT&T had impeded competition

in the long distance market by abusing its control over the local Bell Operating Companies ("Bell Companies" or "BOCs"). The parties settled the case in 1982. The resulting consent decree required AT&T to divest the Bell Companies. See § 1(A).[1]

The 1982 consent decree also placed certain line-of-business restrictions on the newly divested and independent Bell Companies, preventing them from engaging in such activities as long distance telephone service, information services, and the manufacture of telecommunications products. See § II(D). These restrictions were imposed at the insistence of the United States. AT&T expressed opposition to the restrictions but ultimately "agreed to [them] as part of the overall settlement." *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 186 n.227 (D.D.C. 1982), aff'd sub nom. *Maryland* v. *United States*, 460 U.S. 1001 (1983).

The parties agreed that the traditional common law standard for decree modifications would apply to modifications agreed to by the government and the restricted parties. That is the "public interest" standard, under which the district court must approve a proposed modification unless it falls outside the broad reaches of the public interest. See *United States* v. *Western Elec. Co.*, 900 F.2d 283, 305-306 (D.C. Cir.) ("*Triennial Review*"), *cert. denied*, 111 S. Ct. 283 (1990). With regard to modifications opposed by the government, however, the decree expressly displaced the traditional standard of *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), under which there could be no modification in the absence of "unforeseen circumstances" causing "grievous harm" to the party. In its place, Section VIII(C) of the decree provided that a Bell Company could obtain a modification of the line-of-

[1] The 1982 consent decree replaced a 1956 decree, and thus was styled "Modification of Final Judgment" ("MFJ"). *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 226 (D.D.C. 1982), aff'd sub nom. *Maryland* v. *United States*, 460 U.S. 1001 (1983).

business restrictions over the objection of the Department of Justice if it could prove that there is "no substantial possibility" that it could impede competition in the market to be entered. See *United States* v. *AT&T*, 552 F. Supp. at 195 n.266. Section VIII(C) is more stringent than the flexible public interest standard applicable to uncontested modifications. See *Triennial Review*, 900 F.2d at 305.

2. *The Bell Companies' Motion to Modify the Decree*

At issue in this case is the legal standard for modifying restrictions on the Bell Companies, when both the Justice Department and the Bell Companies favor the modification. Accordingly, the factual details of the particular modification request that gave rise to this proceeding are not particularly important. Every modification request will turn on a different set of facts and will be supported (or opposed) by the Department of Justice. Some factual background concerning this modification may be helpful, however, in understanding the sorts of issues that will arise.

Under the decree, the Bell Companies are limited to providing telephone service within geographic areas called "LATAs." § IV(G). This limitation applies to both telephone calls themselves and to network control signals, which route those calls. For calls from one LATA to another, the Bell Company must "hand off" the call (and associated signalling) to a long distance (or "interexchange") carrier.

At the time the decree was entered, network control signals were transmitted over the same circuit as the call itself. More recently, however, the industry has developed a more efficient means for transmitting network control signals, called Common Channel Signaling ("CCS"). CCS involves the transmission of signals over an entirely separate, highly efficient network.

The Bell Companies have begun using CCS in providing network control signals for local telephone services. CCS equipment, which consists mainly of specialized computers, is very expensive. Accordingly, the Bell Companies have economized by using centralized CCS equipment to serve several LATAs. The decree permits the Bell Companies to use CCS equipment located in one LATA to provide network control signals for local telephone services *within* other LATAs, but it prohibits the Bell Companies from doing the same thing when CCS is used to provide network control signals for long distance services *between* LATAs.

In 1989, the Bell Companies requested a modification of the decree to permit them to offer CCS to long distance carriers from these same centralized facilities. In other words, the Bell Companies sought to deliver network control signals to long distance carriers outside the LATA where the call originates. In all cases, however, the call itself would still be delivered to the long distance carrier in the originating LATA. The Bell Companies demonstrated that requiring CCS facilities in every LATA would necessitate a wasteful duplication of CCS facilities, slow the development of the technology, and make it unavailable for some areas and carriers, with no discernible public benefit. See C.A. J.A. 444-490, 550-554, 630-639, 644-653.

The Bell Companies' modification request received strong support from a broad cross-section of long distance carriers. Teleconnect, for instance, then the fourth largest long distance carrier, observed that if it is "precluded from interconnecting on a regional basis, it will be forced to forego using CCS for exchange access at all, or will be forced to incur extraordinary expenses to interconnect in each LATA."[2] Teleconnect noted that "[w]hile the

[2] *Reply of Teleconnect Long Distance Services & Systems Co. in Support of U S West Request for Waiver* at 10-11 (Apr. 17, 1989) (C.A. J.A. 642-643).

largest [long distance carriers], such as AT&T and MCI, might be able to recover such costs because of the size of their customer base, Teleconnect and smaller [long distance carriers] cannot." [3]

AT&T and MCI, the two largest long distance carriers, which already possessed their own CCS networks and stood to lose that competitive advantage if their smaller competitors could efficiently obtain that service from the Bell Companies, opposed the modification request.

After considering the various submissions and conducting its own investigation, the Department of Justice supported the Bell Companies' modification request. The Department concluded that the modification would prevent needless expense, promote competition, and further the public interest. The construction and operation of CCS facilities in every LATA "would impose substantial inefficiencies and unnecessary costs on interexchange carriers—especially smaller carriers—as well as the BOCs, thereby hampering the implementation of * * * CCS and its attendant public benefits." *Memorandum of the United States in Response to U S WEST's Motion for a Declaratory Ruling or, in the Alternative, For a Waiver of the Decree Regarding Common Channel Signaling Interfaces* at 2 (May 12, 1989) (C.A. J.A. 672). The Department emphasized that the modification "would be consistent with the goals of the decree" because the decree was intended not to "impede the efficient provision

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[3] *Id.* at 11 (C.A. J.A. 643). See also, *e.g.*, *Response of US Sprint to U S WEST Motion for Declaratory Ruling* at 4 (Mar. 24, 1989) (the "additional [CCS] equipment would be grossly underutilized and would require many more signaling links—which also would be underutilized—by the [long distance carriers]"); *Letter from Teledial America to the Honorable Harold H. Greene* (Apr. 10, 1989) (C.A. J.A. 539) ("Teledial sees this [waiver] to be vital to the interexchange carriers, and in turn beneficial to the business and residential customer"); *Letter from Digital Signal, Inc. to the Honorable Harold H. Greene* (Apr. 10, 1989) (C.A. J.A. 540) ("Digital Signal fully supports the request [for a waiver]").

of exchange and exchange access services or the implementation of new technologies for providing those services." *Id.* at 15-16 (C.A. J.A. 685-686).

The Department also stressed that "prohibiting the BOCs from centralizing [CCS] signaling interconnection would serve no competitive purpose that would warrant forgoing the efficiencies of centralized interconnection." *Id.* at 19-20 (C.A. J.A. 689-690). It rejected the suggestion that "[c]entralized provision of [CCS] network signaling to interexchange carriers" would result in a threat to competition in interexchange services. *Id.* at 16 (C.A. J.A. 686). To the contrary, the Department explained, "strict adherence to the literal decree requirements" would itself impede competition in interexchange services by imposing "substantial inefficiencies and unnecessary costs" on smaller interexchange carriers. *Id.* at 2 (C.A. J.A. 672).

3. *The Decisions Below*

In July 1990, the district court (Judge Harold Greene) denied the request for a decree modification, applying the more exacting Section VIII(C) standard. App., *infra*, 52a-53a. The court subsequently denied the Bell Companies' motion for reconsideration. App., *infra*, 54a-56a. In the course of its reconsideration ruling, the district court squarely rejected the Bell Companies' contention that the flexible "public interest standard" generally applicable to uncontested modifications should govern when a modification is supported by both the Department of Justice and the restricted parties. "There is not the slightest support," stated the court, "for the point made by some of the Regional Companies * * * that whenever they and the Department of Justice agree on a modification, it is deemed to be uncontested, irrespective of AT&T's opposition." App., *infra*, 55a n.1.

The court of appeals affirmed in a split decision. App., *infra*, 1a-41a. The majority held first that AT&T, "as a

party to the decree" (App., *infra*, 22a), can object to a proposed modification of *any* provision, even one that binds only other parties. Thus, under the majority's approach, AT&T has power to trigger application of the more stringent Section VIII(C) standard whenever it opposes a waiver of the line-of-business restrictions, notwithstanding the support of both the United States and the Bell Companies directly affected by the restriction. The majority found "nothing in the language of the decree that suggests that AT&T should be thought unconcerned with the line-of-business restrictions" (App., *infra*, 18a); instead, "section III treats AT&T as a formal party to the *entire* decree, with specific authority under section VII to demand enforcement of *any* section of the agreement." *Ibid.* (footnote omitted).[4]

Judge Williams dissented. He first pointed out that the majority's decision was at odds with the usual rule governing modifications supported by the Department of Justice and a restricted party: under the majority's decision, "the rump of the original *defendant*, a firm that has no institutional interest in favoring competition in interexchange markets, simply by crying *nyet* can displace the standard normally governing changes that are not contested by the original plaintiff." App., *infra*, 31a. Judge Williams emphasized the anomaly of this result: "[t]he upshot is that restraints originally devised in the name of enhancing competition have now become a private anti-competition agreement between potential competitors (AT&T and the BOCs), to be cheerfully enforced by the courts at the behest of a private party that (naturally) resists intrusion on its turf." *Ibid.*

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[4] The majority concluded that the modification request did not satisfy the requirements of Section VIII(C) of the decree (App., *infra*, 24a-29a); it did not consider the merits of the modification request under the flexible public interest standard applicable to uncontested modifications. As noted on pp. 15-16, *infra*, however, the district court granted an almost identical modification sought by GTE under the public interest standard. See App., *infra*, 57a-61a.

Judge Williams further explained that the majority proceeded from the flawed premise that every party to a decree possesses the same rights as all other parties to the decree. App., *infra*, 35a-37a. In contrast to the majority's assumption that AT&T's status as a party gave it special authority to supervise modifications of restrictions on the Bell Companies agreed to by both the Department of Justice and the Bell Companies, Judge Williams observed that courts in other multiple party cases have refrained from creating "the kind of duty sprawl that the majority indulges here." *Id.* at 36a.[5]

Finally, Judge Williams concluded that legal principles of general applicability strongly support the conclusion that AT&T is not entitled to the extraordinary authority given it by the majority. Antitrust doctrine announced by this Court weighs heavily against "assigning AT&T special rights [respecting] modifications of the line-of-business rules" because such "special rights" would allow "just the sort of preemptive strike against competition" that this Court has rejected in cases such as *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), and *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). App., *infra*, 39a.[6]

Because the district court had not applied the public interest standard governing uncontested modifications,

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[5] With regard to the language of the decree, Judge Williams explained that neither Section VII nor Section III supports vesting AT&T with the extraordinary authority accorded it by the majority. Both, instead, serve unexceptional functions—preserving jurisdiction in the district court (§ VII) and ensuring that rights and obligations of the parties extend to their successors and components (§ III). App., *infra*, 31a-33a.

[6] In response to the majority's conclusion (App., *infra*, 21a) that AT&T's standing to participate in decree proceedings carries with it authority to elevate the standard of judicial review, Judge Williams carefully distinguished between the two issues: "to say that AT&T has standing to sue is not the same as saying that it has the power, by its opposition, to change the standard for approval of a modification." App., *infra*, 40a n.2.

Judge Williams would have remanded the case for consideration under the correct legal standard. App., *infra*, 41a.

REASONS FOR GRANTING THE PETITION

There are two complementary and recurring issues in the law of government antitrust consent decrees. One is how much power, flexibility, and discretion the government has to keep decree restrictions in place when they are still needed to protect competition. The other issue is how much power, flexibility, and discretion the government has to remove decree restrictions that have become outmoded and anticompetitive. Sixty years ago, in *United States* v. *Swift*, *supra*, the Court dealt with the first issue and acted to strengthen the government's hand in maintaining restrictions needed to protect a vulnerable market from reentry by a wrongdoer that posed a continued threat to that market. This case presents the second issue, which is no less important to the government's administration of antitrust consent decrees.

In this case, AT&T opposed a particular modification of the 1982 decree as it applies to the Bell Companies precisely because, due to technological developments, one aspect of the original decree now gives AT&T a competitive advantage over its rivals in the long distance business. The modification is needed to permit the Bell Companies to provide a service (common channel signalling) to smaller long distance companies in competition with AT&T. DOJ, the guardian of the public interest in antitrust matters, has concluded that modification of the decree will promote competition, and the restricted parties (the Bell Companies) support the modification; but AT&T has been permitted to use its position as a successor to the former integrated AT&T, which entered into the decree, to block a modification that would promote competition in the very market that AT&T had allegedly monopolized.

Under the court of appeals' decision—which was not based on any peculiarities of this decree—any signatory to a consent decree has the power to block a modification even though it is neither subject to the restriction in question nor an intended beneficiary of it. This holding has serious implications for three bodies of law:

First, it frustrates antitrust enforcement by giving a private party—indeed a former alleged wrongdoer—a virtual veto power over modifications that are in the public interest. This result is particularly obnoxious where, as here, this power is wielded to protect that party against competition, in direct contradiction to the purposes of the original decree.

Second, it makes multi-defendant consent decrees unworkable and inequitable. An alleged wrongdoer should not, by virtue of being part of a decree, be deemed to have power over the future activities of other restricted parties.

Third, it offends principles of separation of powers by assigning authority over important questions of law enforcement to private parties and to the decree court.

The 1982 decree controls most aspects of the telecommunications industry—an industry of extraordinary importance to the U.S. economy. As the government observed in 1982, when calling for prompt affirmance by this Court of the original decree, uncertainty about the decree would have "a broad and significant adverse impact on the telecommunications industry, on related industries * * * and thus on the public in general. The telecommunications industry, in itself and together with the increasingly dependent data processing industry, is of major and increasing significance in the American economy."[7] This proceeding is scarcely of less importance. Future developments in the industry will not infrequently pit the

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[7] *U.S. Motion to Affirm, Maryland* v. *United States*, No. 82-952, at 12 (footnote omitted).

divested Bell Companies against AT&T, and the holding below will turn the decree into a massive instrument of protection for the benefit of AT&T, the giant of the industry, against new competition.

The procedural posture of this decree accentuates the need for review. Because all requests for modification of the decree are administered by the District Court for the District of Columbia, all appeals will go to the District of Columbia Circuit. The D.C. Circuit is thus effectively a specialized court for administration of the decree. There is no possibility of further development of the law in other circuits. Moreover, since an unusual number of the judges on the D.C. Circuit are recused, *en banc* review is not feasible. The fate of this industry will determine the Nation's technological competitiveness well into the 21st Century. The decision below is not merely an error. It is a catastrophic error—akin to allowing the buggy industry a veto power over the development of automobiles. Review by this Court is clearly warranted.

I. THE QUESTION PRESENTED IS A RECURRING QUESTION OF EXCEPTIONAL PUBLIC IMPORTANCE

The issue in this case is of critical importance to the AT&T consent decree, to the administration of consent decrees generally, and to the Executive Branch's law enforcement authority.

A. The question whether AT&T enjoys a virtual veto power over modification requests supported by the Department of Justice and the Bell Companies is central to the administration of this nationwide consent decree. The decree imposes stringent line-of-business restrictions on the seven regional Bell Companies. § II(D). Whether AT&T, acting in its own private interest, is given the power to trigger a more demanding standard for government-supported modification requests will thus have a profound impact on a wide range of future telecommuni-

cations disputes. The issue extends to requests, such as this one, in which the modification would merely permit the Bell Companies to implement new technology efficiently; it also extends to requests in such broad and varied areas as the restrictions on the Bell Companies in manufacturing, mobile services, and international services.

This consent decree has repercussions throughout the national and international economy. Since 1987, the Justice Department has advocated removal of most of the line-of-business restrictions. See *Triennial Review*, 900 F.2d at 291. The Department of Commerce's National Telecommunications and Information Administration (NTIA) has also emphasized that the decree's restrictions have a major (and largely negative) impact on consumer welfare, technological innovation, and international competitiveness.[8] The issue presented in this case—AT&T's power to frustrate DOJ-supported modifications—bears directly on the lifespan of these restrictions.

This issue is particularly important because of the anticompetitive potential of the decree's restrictions on the Bell Companies.[9] As Judge Williams explained, "the

[8] See *e.g.*, U.S. Dep't of Commerce, *The NTIA Infrastructure Report: Telecommunications in the Age of Information* 213-214 (Oct. 1991) (line-of-business restrictions have "implications for competition, U.S. trade and competitiveness, and telecommunications service prices" and fundamentally affect "the development of the U.S. telecommunications infrastructure"). Of particular relevance to this case, NTIA concluded that preclusion of centralized CCS for interexchange services "hamper[s] efficient deployment of products, services, and capabilities that could enhance the nation's telecommunications system. * * * [C]onsumers would benefit if the BOCs are allowed to deploy [CCS] in the most efficient manner possible, which in certain circumstances could be on a centralized basis." *Id.* at 225.

[9] In originally approving the restrictions as temporary prophylactic measures, the district court acknowledged that they are "inherently anticompetitive," *United States* v. *American Tel. & Tel. Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,980, at 73,149 (D.D.C. Aug. 23, 1982), "because they prevent a potential competitor from entering

restrictions seek, perhaps ironically, to enhance competition by restricting competitive entry. Obviously such a device is rather delicate, even in the hands of the Justice Department or courts, as competitive values are on both sides of the issue. But as an agreement between private firms, the line-of-business restrictions of Section II(D) are simply an agreement of potential competitors to divide the market—*i.e.*, a *per se* violation of the Sherman Act." App., *infra*, 33a-34a. Although designed as transitional safeguards to facilitate the AT&T divestiture, the line-of-business restrictions can become dangerously anticompetitive if they are left in place longer than necessary. The majority's decision entrenches these barriers and, by giving AT&T the power to ratchet the standard of review, makes their removal far more difficult.

A vivid illustration of the dangers of the court of appeals' ruling is provided by AT&T's recent announcement that it plans to buy a 33% interest in McCaw Cellular, with an option to purchase a controlling interest.[10] The Bell Companies have filed a waiver request to provide the very types of interLATA cellular services that AT&T will be providing after its acquisition of McCaw. AT&T has vigorously opposed the Bell Companies' request. The reason for, and potential consequences of, AT&T's opposition are now apparent. AT&T, whose cellular operations will not be bound by the line-of-business restrictions, will be in direct competition with the Bell Companies' cellular affiliates and hopes to gain a substantial competitive advantage over them. What was

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the market." *United States* v. *AT&T*, 552 F. Supp. at 187. The court contemplated that they would be reviewed periodically and removed as soon as competitive conditions permitted. See *Triennial Review*, 900 F.2d at 291 (the "line of business restrictions" were not meant "to be permanent").

[10] McCaw is far and away the largest cellular carrier in the country. Its operations overshadow those of even the largest Bell Company cellular affiliate. Under the terms of the agreement, the new venture will market service under AT&T's name.

intended to be a pro-competitive government consent decree is, thus, being manipulated by a private party to its own competitive advantage, and the Department of Justice—which has recognized the anticompetitive nature of the restrictions on cellular service and urged their elimination—is being relegated to a secondary role in the administration of that decree.

The panel majority's decision will also apply to numerous future waiver requests. Since the decree's implementation in 1984, there have been hundreds of requests to modify the decree or grant waivers. These matters have consumed enormous amounts of governmental and private resources. Over 6,000 briefs have been filed with the district court; in one recent modification request (relating to information services), over 6,000 pages of pleadings were submitted to the district court by interested parties. Published opinions of the district court relating to waiver disputes have filled thousands of pages in the federal reporters, and the D.C. Circuit has handled 15 groups of consolidated appeals. Plainly, a correct articulation of the legal standard applicable to government-supported modification requests will have a fundamental bearing on the disposition of large amounts of litigation in the federal court system.

Finally, contrary to the majority's implication that the availability of relief under Section VIII(C) diminishes the importance of this issue (App., *infra*, 22a), application of the VIII(C) standard places significant stumbling blocks in the way of DOJ-supported waivers. As the D.C. Circuit has emphasized, the difference between the flexible public interest standard applicable to government-supported modifications, and the standard required by Section VIII(C), is frequently dispositive. See *Triennial Review*, 900 F.2d at 305-307. This difference is illustrated by the fact that, when AT&T raised precisely the same objection to the offering of centralized CCS services by GTE (the nation's largest local exchange car-

rier and the subject of its own consent decree with DOJ, to which AT&T is not a signatory), the district court applied the public interest standard, rejected AT&T's objection, and granted the DOJ/GTE waiver request. *United States* v. *GTE Corp.*, No. 83-1298 (March 26, 1992), reprinted App., *infra*, 57a-61a.

B. This case also has profound significance for multi-party consent decrees under other statutory schemes. The federal government regularly enters into multi-party consent decrees not just in antitrust cases, but in such other contexts as civil rights, environmental enforcement, and pension litigation.[11] Under the majority's reasoning in this case, every modification agreement between the government and an enjoined decree party could potentially be subject to an effective veto (through an elevated standard of review) by other parties. Granting *each* defendant the right to be the arbiter of the standard of review for agreements between the government and restricted parties would convert a flexible tool for regulatory enforcement into a weapon of special interest manipulation.

It must be stressed that the holding below is *not* based on any peculiarities of this particular consent decree but will apply to multi-party decrees generally. The only decree provisions to which the court referred were unexceptional retention-of-jurisdiction and successorship pro-

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[11] See, *e.g.*, *United States* v. *Cannons Eng'g Corp.*, 720 F. Supp. 1027 (D. Mass. 1989), aff'd, 899 F.2d 79 (1st Cir. 1990) (environmental enforcement); *United States* v. *D'Addario Indus.*, DOJ File No. 90-5-2-1-1270 (D. Conn. 1992) (environmental enforcement); *United States* v. *Van Leer Containers and Inland Steel Co.*, DOJ File No. 90-5-2-1-718 (N.D. Ohio 1988) (environmental enforcement); *United States* v. *Independent Plating Co. and Worcester Manufacturing, Inc.*, DOJ File No. 90-5-1-1-2599 (D. Mass. 1986) (environmental enforcement); *United States* v. *Arizona*, Civ. No. 88-1989 PHX EHC (Dist. Ariz. 1989) (civil rights); *United States* v. *Suffolk County*, Civ. No. 83-C-2737 EHN (E.D.N.Y. 1986) (civil rights); *Martin* v. *Magnetek, Inc.*, No. 91-C-613 (E.D. Wisc. 1992) (pension litigation); *Martin* v. *Geosource, Inc.*, Civ. A. No. H-91-3196 (S.D. Tex. 1992) (pension litigation).

visions. AT&T's power to act as spoiler arises, according to the court, because of its status as a decree party—a status it shares with numerous other parties to consent decrees who might find it in their private interest to obstruct modifications in consent decrees applicable to other defendants.

This Court's recent decisions declaring the compelling need for flexibility in judicial evaluation of consent decree modifications attest to the exceptional public importance of the issue in this case. See *Rufo* v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992); *Board of Educ.* v. *Dowell*, 111 S. Ct. 630 (1991). In these cases, the Court has emphasized the need to afford the government flexibility in securing decree modifications, even when the modification is sought by the restricted party over the original *plaintiff's* objection and even when the defendant proposing the modification has been found to have committed constitutional violations.[12] The instant case—and others like it—present a far more compelling case for flexibility in consent decree modifications: the plaintiff and the restricted parties agree, and the original defendant has no incentive to protect the public interest in vigorous competition. Yet the majority's decision would impose a higher standard of review every time a nonrestricted signatory raises an objection to the modification.[13]

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[12] See, *e.g.*, *Rufo*, 112 S. Ct. at 758 (stressing "the need for flexibility" in modifying a consent decree); *ibid.* (court should apply "the traditional flexible standard for modification of consent decrees"); *ibid.* (court should take "a flexible approach"); *id.* at 760 ("a district court should exercise flexibility in considering requests for modification").

[13] Competitive reform of the nation's telecommunications industry has many of the characteristics of "institutional reform" litigation in which "the public interest is a particularly significant reason for applying a flexible modification standard." *Rufo*, 112 S. Ct. at 759. Although the instant case does not literally involve a governmental institution, it is clear that public interests, not just private com-

C. The decision below also threatens the authority and prerogatives of the Executive Branch. The majority's decision sharply constricts DOJ's enforcement discretion. This Court repeatedly has emphasized that the Justice Department "must alone speak for the public interest" in antitrust matters.[14] By permitting AT&T to override DOJ-sponsored modifications that are in the public interest, the majority's decision conflicts with the government's constitutional responsibility to take care that the laws are faithfully enforced and obstructs its ability to remedy unintended anticompetitive consequences of its own litigation. The majority's decision also unduly shifts power over antitrust policy from the Department of Justice to the district court administering the decree. Instead of merely verifying that a DOJ-supported modification is "within the reaches of the public interest," the district court will be able (as it did here) to make its own determination as to the competitive merits of any AT&T-opposed modification.[15]

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mercial interests, are at stake in achieving a sound and efficient telephone system in the United States.

[14] *Buckeye Coal & Ry. Co.* v. *Hocking Valley Ry Co.*, 269 U.S. 42, 48-49 (1925). See also, *e.g.*, *Swift & Co.* v. *United States*, 276 U.S. 311, 331-332 (1928) (the Attorney General's "authority to make determinations includes the power to make erroneous decisions as well as correct ones"); *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961) (it would be improper "to assess the wisdom of the Government's judgment in negotiating and accepting [a] consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting"); *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 14 (1979) (DOJ has the "principal responsibility for enforcing the Sherman Act"); *California* v. *American Stores Co.*, 495 U.S. 271, 295-296 (1990) (emphasizing the difference between antitrust suits brought by private plaintiffs and those brought by DOJ).

[15] The court of appeals has emphasized that the difference between the two standards is often decisive and "is not a mere academic question." *Triennial Review*, 900 F.2d at 306.

This infringement on the Executive Branch's authority raises serious separation of powers concerns. In *Maryland* v. *United States*, 460 U.S. 1001 (1983), three members of this Court (then-Justice Rehnquist, Chief Justice Burger, and Justice White) expressed substantial constitutional reservations over the expansive role of the district court in second-guessing the Justice Department's judgment as to the terms of the AT&T settlement. *Id.* at 1001-1004 (Rehnquist, J., dissenting). By making the Department of Justice's modification agreements subject to a non-restricted party's veto, and by substantially increasing the power of the district court to reject decree modifications when a non-restricted party objects, the majority's decision greatly exacerbates the separation of powers concerns raised by Judge Greene's initial approval and continuing administration of the decree.

II. THE COURT OF APPEALS' DECISION IS PLAINLY IN ERROR AND SHOULD BE REVERSED

By giving AT&T unilateral power to block DOJ-supported line-of-business waivers that would promote competition in the market that AT&T allegedly monopolized, the court of appeals' decision turns the decree on its head. Instead of sheltering competitive markets from AT&T's allegedly monopolistic conduct, the decision allows AT&T to shelter itself from additional competition in markets that it still dominates, and dramatically weakens the government's ability to achieve the pro-competitive goals that animated the original divestiture litigation.[16]

AT&T's role as a party to the decree does not support this perverse result. The majority failed to recognize that

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[16] As the Justice Department explained in the court below, "the decree was intended to remove the anticompetitive advantages AT&T had enjoyed over its interexchange competitors, not to aid AT&T in gaining or maintaining such advantages. Accordingly, the Court should not permit AT&T to block application of the public interest standard in order to further AT&T's anticompetitive private interests." See DOJ C.A. Br. 36.

multiple parties commonly have separable rights and obligations. The mere fact that AT&T has certain separately enumerated rights and obligations under the decree does not give AT&T veto power over modifications of restrictions that apply only to *other* parties. There is no logical reason why AT&T's interest in supporting or opposing modification of restrictions binding the Bell Companies should be given *different* treatment from that of other identically-situated interexchange carriers, such as MCI.[17] AT&T alone among interexchange carriers is a party to the decree, not because it needed or is entitled to any special, unique protection under the line-of-business restrictions, but because it had specific obligations of its own under reorganization. See App., *infra*, 33a-37a.

Moreover, the court of appeals disregarded the fact that the old AT&T, which entered the decree, is not the same legal entity as the present, smaller AT&T, which now seeks to obstruct a pro-competitive modification. The old Bell System was divided into eight successor companies, each of which has rights and obligations under the decree with respect to its own operations. Any rights that the prior integrated company had with respect to the local exchange functions have now been inherited by its constituent parts. It makes no sense to treat one portion of the old company as having continued control over the now-independent parts of the former Bell System. A divested Bell Company has no right to interfere in the administration of the decree as it applies to AT&T, and AT&T has no right to interfere in administration of the decree as it applies to the Bell Companies. AT&T is attempting to exercise legal rights that do not belong to it.

Nothing in the language of the decree supports the majority's anomalous result. Section III merely estab-

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[17] The majority's recognition of the identity of AT&T's interest with MCI's (App., *infra*, 17a-18a) should have led it to conclude that AT&T has the same remedy as MCI and other interexchange carriers (standing to voice an objection), rather than a superior right (authority over the standard of review).

lishes that the rights and obligations of the decree parties extend to their successors and components. Section VII provides simply for retention of jurisdiction; not a word suggests that each party is given veto power over modification of the separately enforceable rights and obligations of distinct parties.[18] Indeed, as the United States advised the court of appeals, established Justice Department policy would have foreclosed consent "to any limitation on its traditional common law right to seek modification under the public interest standard." C.A. Br. 27-28.

It is absolutely clear that AT&T was not the intended beneficiary of the restrictions. At the time that the restrictions were reviewed, AT&T *opposed* them. App., *infra*, 37a.[19] The Justice Department, in turn, made clear that it would "limit the duration of the restrictions to the minimum period required by the state of technology and competition."[20] Thus, far from bargaining for permanent restrictions on the Bell Companies, AT&T made clear that it opposed the restrictions altogether and DOJ

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[18] The sole purpose of Section VIII(C) was to replace the *Swift* test that would otherwise apply in cases where DOJ *opposed* relief. See *United States* v. *AT&T*, 552 F. Supp. at 195 n.266; C.A. J.A. 150. Section VIII(C), which applies to Bell Company modification requests, was never intended to hobble government efforts to modify the decree.

[19] See C.A. J.A. 181-182 (AT&T counsel: "I'm against restrictions. I'll be happy if nobody is restricted on anything. After this divestiture occurs, let [the BOCs] do what they want"); *id.* at 126-127 (AT&T counsel: "We do not want restrictions on those BOCs. That wasn't our idea."). As the government noted below (C.A. Br. at 31), "[d]uring the 1982 public interest proceedings, AT&T very explicitly disclaimed any interest in the line of business restrictions."

[20] *Response of the United States to Public Comments on Proposed Modification of Final Judgment* at 62 (May 20, 1982) (C.A. J.A. 129).

made clear that it would lift them at the earliest possible time.[21]

The panel's error produces a result dramatically at odds with antitrust principles. By making the line-of-business restrictions more difficult to modify, the decision rigidly enshrines these barriers to new competitive entry. As Judge Williams explained (App., *infra*, 39a), moreover, the ruling gives AT&T the power to interfere with modifications based on perceived injury from increased competition. *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), makes clear that injury of that sort is not a concern of the antitrust laws. The same principle confirms that modification of a consent decree should *not* be subject to veto by a non-restricted party whose interest lies in *minimizing competition* in its markets.[22]

AT&T plainly holds no proxy for the public interest.[23] Unlike the Department of Justice, AT&T's responsibility runs to its shareholders. It has a fiduciary duty to oppose any modification that might adversely affect its own business, no matter how much the modification might

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[21] As the government explained to the court below (DOJ C.A. Br. 27-28): "The record in the 1982 public interest proceedings does not indicate that the parties considered the possibility that AT&T might oppose a decree modification sought by the BOCs, much less that they intended that AT&T's opposition deprive the government of its right to seek modification of restrictions on the BOCs under the public interest standard."

[22] In contrast to this case, if DOJ seeks to *increase* a decree restriction over *the restricted party's* objection, a more demanding standard governs. See, *e.g.*, *Ford Motor Co.* v. *United States*, 335 U.S. 303 (1948); *Chrysler Corp.* v. *United States*, 316 U.S. 556 (1942); cf. *United States* v. *Western Elec. Co.*, 894 F.2d 430, 434-435 (D.C. Cir. 1990). Here, of course, no restriction on AT&T is being increased (or even affected).

[23] See generally *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2145 (1992) ("[v]indicating the *public* interest * * * is the function of Congress and the Chief Executive").

improve competition and thereby serve the public interest. AT&T, the dominant force in the industry, does not in any way represent the interest of interexchange carriers as a group. It obviously has no duty to its competitors in the interexchange services market. On the contrary, its duty to its shareholders leads it naturally to advance its own interest at the expense of its competitors.

This case is a perfect illustration. As the majority pointed out (App., *infra*, 20a-21a n.15), the widespread signalling facilities that AT&T retained after divestiture give it a significant competitive advantage over smaller carriers, who must either invest in comparable facilities or limp along without them. That consideration alone is enough to impel AT&T to oppose the waiver at issue here, because if granted it could diminish the competitive value of AT&T's advantage. Placing such power in the hands of the industry giant is a recipe for significant anticompetitive distortions in telecommunications markets, a result neither contemplated by the parties to the decree nor compatible with the government's underlying enforcement responsibilities.

III. THE COURT OF APPEALS' DECISION CONFLICTS IN PRINCIPLE WITH NUMEROUS DECISIONS REGARDING DECREE MODIFICATION

As Judge Williams noted, the majority opinion "displace[s] the standard normally governing changes that are not contested by the original plaintiff." App., *infra*, 31a.[24] Under the established rule, a flexible public interest test applies when the government and the enjoined

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[24] The Justice Department explained in its brief in the D.C. Circuit (at 34) that "[o]pposition from private parties does not normally oust the public interest standard, and there is no reason to limit the discretion afforded the Department under that standard merely because the private party objecting to a proposed modification is another defendant, rather than an innocent non-party" (footnote omitted).

defendant agree to a decree modification. Numerous decisions have routinely applied this standard.[25] The basis for that standard is (1) the consensual nature of the agreement between the plaintiff that sought the restriction and the defendant bound by the restriction and (2) the discretion that should be afforded the government's policy and enforcement determinations.[26]

The reasoning of these cases is fully applicable in this context. Both factors—agreement between the plaintiff and the restricted party and deference to the government's policy and enforcement determinations—are present when DOJ and the restricted party agree on a modification; the objection of a decree signatory who is not bound by the pertinent restriction does not alter the significance of those two elements. Under these authorities, the court's role is limited to considering whether the modification falls within the broad reaches of the public interest. The court of appeals' decision is inconsistent with those precedents.

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[25] The modern cases allow the Justice Department and the restricted party broad discretion to modify decrees; the courts have only a limited role to assure that the modification falls within the broad reaches of the public interest. See, *e.g.*, *United States* v. *Yoder Bros., Inc.*, 1989-2 Trade Cas. (CCH) ¶ 68,723 (N.D. Ohio, April 28, 1986); *United States* v. *National Finance Adjusters, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,856 (E.D. Mich. Aug. 9, 1985); *United States* v. *General Electric Co.*, 1977-2 Trade Cas. (CCH) ¶ 61,659 (E.D. Pa. Sept. 16, 1977); *United States* v. *Swift & Co.*, 1975-1 Trade Cas. (CCH) ¶ 60,201 (N.D. Ill. Jan. 17, 1975). In 1982, DOJ explicitly identified this established standard as applicable to government requests to remove line-of-business restrictions. See C.A. J.A. 150. See also, *e.g.*, Note, *Modifications of Antitrust Consent Decrees: Over a Double Barrel*, 84 Mich. L. Rev. 134, 135, 143-144 (1985) (courts apply a "public interest standard" to government-sponsored modifications that is "extremely deferential to the Justice Department's determination of the public interest").

[26] These two factors underlie the legal principle requiring deference to the Justice Department's decision to accept a consent decree in the first place. See *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981).

Unless reviewed, the decision below will plague the future development of the telecommunications industry specifically and the use of multi-party consent decrees in general. It has the bizarre effect of giving an alleged wrongdoer a continuing veto power over the enforcement policy of the government and the business operations of its competitors for no more logical reason than that it is subject to restrictions under the same decree. Nothing in the law of consent decrees supports such a result. Competitive restrictions in antitrust decrees are, in Judge Williams' words, a "rather delicate" device, "even in the hands of the Justice Department or courts." App., *infra*, 33a. They must be subject to revision in the public interest as economic and technological circumstances dictate, or they may easily become embargoes on vigorous competition. The decision below holds these needed changes hostage to the private interests of one of the enjoined parties. This Court should grant review of the decision below and hold that a party defendant to a decree that is neither subject to nor the intended beneficiary of the restriction has no power to obstruct modifications in the obligations of other parties, deemed by the Department of Justice to serve the public interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 16, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5333

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., ET AL.

BELL ATLANTIC CORPORATION, APPELLANT

No. 90-5335

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., ET AL.

U S WEST, INC., APPELLANT

No. 90-5337

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., ET AL.

AMERITECH, APPELLANT

No. 90-5351

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., ET AL.

PACIFIC TELESIS GROUP, APPELLANT

No. 90-5365

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., ET AL.

BELLSOUTH CORPORATION, APPELLANT

No. 90-5367

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., ET AL.

SOUTHWESTERN BELL CORPORATION, APPELLANT

No. 90-5373

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., AND
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

NYNEX CORPORATION, APPELLANT

Appeals from the United States District Court
for the District of Columbia

(82cv00192)

Argued January 21, 1992

Decided July 24, 1992

Before: SILBERMAN, WILLIAMS, and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

Dissenting Opinion filed by *Circuit Judge* WILLIAMS.

SILBERMAN, *Circuit Judge*: The seven regional Bell Operating Companies (BOCs or Companies) and the United States appeal from the district court's denial of a waiver of the AT&T consent decree to permit centralized provision of the "signaling" component of long distance telephone calls. The appellants[1] maintain that their motion for a waiver should not be evaluated under the standard set forth in section VIII(C) of the decree—whether the proposal presents *no substantial possibility* of impeding competition—but rather under section VII and the more permissive test for unopposed decree modifications that we applied to the information services portion of the *Triennial Review* case: whether the requested waiver would be *certain* to lessen competition. *See United States v. Western Elec. Co.*, 900 F.2d 283, 308 (D.C. Cir.) (*Triennial Review Opinion*), *cert. denied*, 111 S. Ct. 283 (1990).

We think that the section VIII(C) standard applies and that the BOCs failed to demonstrate that their proposal satisfied that standard. We therefore affirm the judgment of the district court.

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[1] Because the Companies and the United States each seek reversal of the judgment below, we refer to them together as "appellants," although the government is technically an appellee.

I.

The 1982 consent decree settled the government's antitrust suit against the "Bell System" by first separating the BOCs[2] and their monopolies over local telephone ("exchange") service from AT&T and its more competitive long distance ("interexchange") and equipment manufacturing businesses and then—with section II(D)'s "line-of-business" restrictions—prohibiting the BOCs from reentering those and other competitive markets. *See generally United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982) (*Decree Opinion*), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C.) (*Reorganization Opinion*), *aff'd mem. sub nom. California v. United States*, 464 U.S. 1013 (1983).

Section II(D)(1) of the decree, which prohibits the BOCs from providing any "interexchange telecommunications services," was implemented, and the scope of the seven BOCs' local monopolies defined, by dividing the country geographically into 164 "exchange areas" (better known as "LATAs").[3] *See generally United States v. Western Elec. Co.*, 569 F. Supp. 990 (D.D.C. 1983) (*LATA Opinion*). Each local operating company (*see* note 2) encompasses

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[2] The seven BOCs—Ameritech, Bell Atlantic Corp., BellSouth Corp., NYNEX Corp., Pacific Telesis Group, Southwestern Bell Corp., and U S WEST, Inc.—are independent Regional Holding Companies, each controlling several of the Bell System's 22 local operating companies. The Companies are also known as the "RBOCs," "RHCs," or "Baby Bells."

[3] The full text of the consent decree, formally entitled the Modification of Final Judgment, appears in the *Decree Opinion*. *See* 552 F. Supp. at 226-32.

several LATAs but is nevertheless allowed to transmit telecommunications information only between points within a single LATA, providing what is, basically, the traditional local telephone service. When a person in one LATA calls a person in another, the BOC serving the caller's LATA must transmit the call to an interexchange carrier, such as AT&T or MCI, which then carries the call on its own network across the LATA boundaries, where it is picked up by the BOC serving the called party's LATA. (If the caller and called party live in different LATAs within one Company's region, the same Company both passes and picks up the interexchange call.) Section II(A) of the decree obliges the BOCs to provide such "exchange access" services to all interexchange carriers, and section IV(F) requires them to do so "at a point or points within [a LATA] designated by [the] interexchange carrier."[4] These "points of presence" in each LATA are thus the locations where the telecommunications networks of the

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[4] Section IV(F) states, in relevant part:

"Exchange access" means the provision of exchange services for the purpose of originating or terminating interexchange telecommunications. Exchange access services include any activity or function performed by a BOC in connection with the origination or termination of interexchange telecommunications, including but not limited to, the provision of network control signalling . . . . Such services shall be provided by facilities in an exchange area for the transmission, switching, or routing, within the exchange area, of interexchange traffic originating or terminating within the exchange area, and shall include switching traffic within the exchange area above the end office and delivery and receipt of such traffic at a point or points within an exchange area designated by an interexchange carrier for the connection of its facilities with those of the BOC.

seven Companies and the numerous interexchange carriers interconnect. *See LATA Opinion*, 569 F. Supp. at 994 n.13.

The telephone "call" that a Company passes to an interexchange carrier consists of two components. One is the actual communication (*e.g.*, the voices) of the calling and called parties. The other is "network control signaling," which directs the operation of the telecommunications network, telling the switches and circuits how and when to set up and disconnect a call. The signaling indicates that a receiver has been picked up, what digits were dialed, whether the called line is ringing or busy, when the phone is hung up, and so forth. When the decree was approved in 1982, almost all signaling was "in-band," meaning that the communication and its associated network control signals were transmitted over the same circuit and therefore delivered to the interexchange carrier at the same location—the carrier's point of presence in each LATA. In-band signaling, however, has significant limitations. Because the signals travel over the same circuit as the callers' communication, they must precede or follow the communication. In-band signaling is also relatively slow and can carry relatively little information.

In recent years a new signaling technology has emerged. In "out-of-band" or Common Channel Signaling (CCS), the signals are transmitted over a system of switches and circuits separate from that of the communications they control. The CCS and communications networks are not parallel but rather linked only at special CCS switches known as Signal Transfer Points (STPs). Out-of-band signaling is much more efficient than in-band. The CCS network contains only signals, which can be packeted into

bursts of information and loaded into a circuit with no gaps; in contrast, a single voice communication takes up an entire circuit, even when the parties are not saying anything. As a result, a single CCS circuit can carry the signaling for over 10,000 calls. Each STP pair, moreover, can be connected to multiple communications switches, allowing a few STP pairs to serve a very large area.

The advantages of CCS are undisputed. Its speed markedly reduces call set-up time—the time between dialing on one end and ringing on the other—a benefit of particular value to long distance service. It also frees circuits for communications by not clogging them while callers listen to busy signals or service announcements. And it provides the technological foundation for a variety of new telecommunications services, including some for which the signaling functions as part or all of the communicated information. For example, CCS enables the telephone number of the calling party to be transmitted to the called party, allowing such caller identification features as distinctive ringing and selective call screening, call waiting, and call forwarding.

The BOCs have begun to deploy CCS networks for use in providing local (intra-LATA) exchange services. The CCS efficiencies and network structure have allowed the Companies to deploy centralized STP pairs, each pair having the capacity to serve several of a Company's LATAs.[5] U S WEST's STP pair in Minneapolis, for example, serves U S WEST switches in

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[5] That the decree permits the Companies to use centralized STP pairs to support their own intra-LATA services is not in dispute. STPs are deployed in pairs to provide greater reliability. The paired STPs need not be in the same location.

six of its LATAs. In 1989, in fact, the BOCs predicted that all 164 LATAs could be served by only 27 STP pairs, although many more pairs have been installed in the last three years. The interexchange carriers have also been deploying CCS networks for use in their interexchange systems. AT&T inherited the Bell System's nascent CCS network at divestiture, and MCI has also extended signaling facilities to almost every LATA. The smaller carriers have lagged somewhat behind.

This case is brought because the BOCs have not yet installed an STP pair in *every* LATA and wish to avoid having to do so just to allow the interexchange carriers to connect in *every* LATA. Instead, they would like authority to provide the carriers access to CCS service only at certain centralized locations. Under their proposal, in other words, there would not be a section IV(B) point of presence—at least for this service—in every LATA. The BOCs maintain that meeting the section IV(B) requirement for CCS would be expensive and inefficient for both them and the interexchange carriers, particularly the smaller ones. It is claimed that not all LATAs (especially in less populated areas) have sufficient call volume to cost-justify their own STP and that the smaller carriers also could not afford construction of a CCS link to an STP in every LATA. AT&T and MCI, on the other hand, with significant investment in CCS systems more extensive than their smaller competitors, want interconnections in every LATA so as to benefit from those investments.

In February 1989 U S WEST filed a motion in the district court requesting a waiver "of the Decree" to allow centralized signaling interfaces. (Under its proposal, the communications component of interex-

change calls would still be provided at the point of presence in each LATA, as would in-band signaling if the carrier so requested.) US WEST purported to act "pursuant to section VII of the Decree," a provision that authorizes the district court to modify the decree upon application of any party.[6] Section VII does not include any criterion for judging proposed changes, so motions under it are presumed to be governed by the appropriate common law standard. *See Triennial Review Opinion*, 900 F.2d at 305-07. Changes uncontested by any party to the decree are granted if "within the reaches of the public interest," *id.* at 306 (quotation marks omitted)—that is, unless they are "certain to lessen competition," *id.* at 308.[7]

The positions of the decree parties in this case were divided. The other six BOCs supported U S WEST's motion and filed similar motions of their

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[6] Section VII states that:

> Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this [decree], or, after the reorganization specified in section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this [decree], for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

[7] By contrast, changes opposed by a decree party—at least when that party is the United States, *see Triennial Review Opinion*, 900 F.2d at 294 n.12—may be denied unless there is " 'a clear showing of grievous wrong evoked by new and unforeseen conditions.' " *Id.* at 305 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932)). *But cf. Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (suggesting a more lenient reading of *Swift*).

own.[8] The Department of Justice (DOJ) told the Companies to file directly in the district court, claiming that the motions did not involve a modification of the line-of-business provisions and so the DOJ pre-screening procedure, *see United States v. Western Elec. Co.*, 592 F. Supp. 846, 873-74 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985), was inapplicable. The DOJ then filed a "memorandum" supporting the CCS waiver request.

However, the remaining party to the decree, AT&T, opposed the Companies' motions, arguing that section IV(F) of the decree expressly obliges the Companies to provide access to network control signaling in every LATA and that the centralization of signaling would allow the BOCs to transmit telecommunications information—the signals—across LATA boundaries in violation of the section II(D)(1) interexchange services ban. AT&T argued that the proposal should therefore be evaluated not under section VII but under the decree's other provision for modification, section VIII(C).[9] That section was added to the decree to establish an explicit standard governing a particularly important type of modification: con-

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[8] The BOCs also sought a declaratory judgment that the decree allows them to use centralized CCS interfaces. The government opposed that portion of the motions, the district court flatly denied it, and the Companies have not pursued it on appeal.

[9] Section VIII(C) states in full:

> The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

tested changes in the decree's core line-of business restrictions.[10] *See Triennial Review Opinion*, 900 F.2d at 291. Section VIII(C) requires a BOC seeking to waive or remove a section II(D) restriction to demonstrate that "there is no substantial possibility that it could use its monopoly power [in the local exchange market] to impede competition in the market it seeks to enter." The Companies' blanket, nationwide waiver proposal, AT&T asserted, could not satisfy that test, and the BOCs were unwilling to limit their request to transitional waivers for the particular LATAs for which a specific showing of low call volume and inefficiency of STP and CCS link installation might be made. MCI, intervening, essentially joined AT&T in these arguments.

The district court, shortly after our *Triennial Review Opinion* issued, held that the waiver proposal did not satisfy the section VIII(C) test. *See United States v. Western Elec. Co.*, 131 F.R.D. 647, 650-52 (D.D.C. 1990) (*Waiver Opinion*), *reconsideration denied*, Civ. No. 82-0192 [1990 U.S. Dist. LEXIS 12153] (D.D.C. Sept. 6, 1990) (*Reconsideration Opinion*). The BOCs and the Department of Justice appeal.

II.

The dispute between the parties has two main facets. The Companies and the Justice Department contend that the waiver request does not substantially

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[10] Section VIII(C) was added because of a concern that otherwise contested line-of-business modifications would be governed by the stringent *Swift* "unforeseen conditions" test, *see supra* note 7, preventing pro-competitive changes in response to new but foreseeable market conditions. *See Triennial Review Opinion*, 900 F.2d at 291; *Decree Opinion*, 552 F. Supp. at 194-95 & n.266.

implicate the decree's line-of-business restrictions and therefore that the standard to determine whether it should be granted is not the potentially demanding section VIII(C) test but rather the more relaxed public interest test embodied in section VII. Alternatively, the appellants maintain that the applicability of section VIII(C) turns on the position of the DOJ—the plaintiff and "Prime Mover" in the antitrust case underlying the decree. Even if section VIII(C) would apply had the government contested the CCS waiver, the argument goes, section VII and the public interest test govern here because the DOJ does support the proposal. AT&T's opposition to a modification of a line-of-business restriction, the appellants claim, has no more significance than that of other, non-party interexchange carriers.

The first argument is based on the notion that the centralization of signaling interfaces involves primarily not an *entry* into the interexchange services market prohibited by section II(D)(1) but rather a *redefinition* of the Companies' obligation under section IV(F) to provide network control signaling in each LATA. The appellants assert that a small adjustment in the definition of the BOCs' exchange access monopoly is distinguishable from an "entry" into a new and competitive line of business, even though the CCS waiver might "affect" the interexchange market.[11] We think that is a distinction

[11] At oral argument, counsel for the BOCs did not press the claim that centralization of signaling interfaces would not violate the section II(D)(1) restriction at all because the Companies would not transmit "end user communications" across LATA boundaries. Indeed, the Companies propose to transmit signaling information between points in different LATAs for a price (the access charge), and that would appear to make the proposed service "interexchange telecom-

without a difference. By that logic, the decree's most sensitive restriction placed on the Companies might be eroded merely by redefining the decree's terms. The Companies could, for example, just as well move to redefine "interexchange telecommunications" as transmission of information from one Company's region to another's, rather than from one LATA to another, vastly expanding the Companies' monopolies. It is therefore plain to us that the CCS waiver would not merely change the details of existing exchange access service, but would allow the BOCs to expand their monopolies over exchange access into a slice of the competitive interexchange services market—maybe a narrow slice, involving (for now) only the transmission of traditional network control signaling between the LATAs in each Company's region, but a slice nevertheless. Therefore, a modification that requires a change in a line-of-business restriction is, *if contested*, governed by the section VIII(C) test.

The more serious argument, that the relaxed section VII public interest standard governs waivers supported by the DOJ whether or not opposed by AT&T—*i.e.*, if the DOJ approves a waiver, it is not "contested"—is largely a product of a footnote in our *Triennial Review Opinion*. *See* 900 F.2d at 294 n.12. We affirmed, in that case, the district court's refusal to lift the decree's ban on the BOCs' manufacturing of telephone equipment, *see id.* at 301-04,

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munications" and "telecommunications service" as defined in sections IV(K) and (P) of the decree. *See United States v. Western Elec. Co.*, 907 F.2d 160, 163-64 (D.C. Cir. 1990) (*Gateway Opinion*) (discussing interpretation of section II (D) (1)), *cert. denied*, 111 S. Ct. 1018 (1991); *see also Reconsideration Opinion*, Mem. at 1-2 ("[T]he transport of signaling messages over LATA boundaries is an interexchange function . . . ."); *Waiver Opinion*, 131 F.R.D. at 650 (same).

but reversed a similar refusal to allow the Companies to provide information services, *see id.* at 305-09. We drew a distinction between proposed modifications of the line-of-business restrictions that were unopposed by the other two parties to the decree (the government and AT&T), and waivers contested by either or both of them. The latter were governed by the section VIII(C) standard, whereas uncontested proposals were to be judged by the more lenient "within the reaches of the public interest" standard. *See id.* at 305-07.

We also noted that the decree contemplated that only the Companies could petition under section VIII(C) for modification of the line-of-business restrictions. *See id.* at 294-95. Therefore, if the DOJ wanted an alteration of those restrictions it would necessarily proceed under section VII, the provision authorizing any party to seek decree modifications. *See id.* at 294. We then added a footnote raising a question as to what standard would apply to such a motion:

> The Government opposed the modification sought in *Swift*, and therefore it is not at all clear to us that the stringent, so-called "unforeseen conditions" test of *Swift* would apply to motions brought by the DOJ under section VII. *Since the DOJ is, as plaintiff, the "Prime Mover" of this case, it may well be that modifications it seeks should be evaluated under a standard somewhat more akin to the "public interest" test of the Tunney Act.* Still, it is true that the line of business restrictions were part of what AT&T bargained for in the original decree, therefore suggesting that the modification requests that AT&T opposes should perhaps be viewed differ-

> ently from those that all the parties agree to. We need not pass on this issue here since the DOJ brought no motion under section VII.

Id. at 294 n.12 (emphasis in original deleted; new emphasis added).

Appellants, relying exclusively on the italicized portion of the footnote, assert that by asking the question of what standard applied, we answered it—that we have strongly implied that the government's support for a waiver causes the public interest test to govern. That is a strained interpretation at best, since we have clearly indicated that if AT&T opposes a line-of-business modification, then DOJ's support, in whatever form, does not relieve the Companies from meeting the section VIII(C) test. Thus, in the *Triennial Review Opinion* itself we treated the BOCs' motion to remove the manufacturing line-of-business restriction as contested and subject to the section VIII(C) standard notwithstanding DOJ's support for the proposal. *See id.* at 301. And in the subsequent *NYNEX Procurement Opinion* (*United States v. Western Elec. Co.*, 907 F.2d 1205 (D.C. Cir. 1990)), where it was the Justice Department that formally moved for a waiver of a section II(D) restriction, we said that the Department "bears the same burden that [the BOC] would" and remanded for the district court to determine whether AT&T had properly opposed the waiver. *See id.* at 1207-09 & n.3.

Appellants nevertheless, and for the first time in this series of cases, squarely challenge the proposition that AT&T's opposition to a proposed change should have such important consequences as to trigger the more stringent section VIII(C) standard. They argue that AT&T's "rights" under the decree are unaffected

by changes in the line-of-business restrictions on the BOCs, and therefore that AT&T's "legal or equitable status" in relation to the CCS waiver should be thought no different than any other interexchange carrier's—*i.e.*, not significant enough to affect the standard by which we evaluate the proposal. *See Triennial Review Opinion*, 900 F.2d at 292, 305-07 (opposition by non-party intervenors does not make the information services modification "contested" and subject to the section VIII(C) test). Appellants point in particular to the Justice Department's role as the "principal proponent" of the line-of-business restrictions, *Decree Opinion*, 552 F. Supp. at 186 n.227, and to AT&T's professed neutrality or opposition to those restrictions during the decree negotiations. As those provisions were not part of the "bargain" AT&T sought, we are told, AT&T's opposition to their alteration now should be deemed legally inconsequential.

It is, however, those line-of-business restrictions that prevent the Companies from a full-bore entry into the interexchange market. It seems more than passing strange to suggest that the decree should be interpreted so as not to allow AT&T to contest, under section VIII(C), the BOCs' complete entry into the interexchange market. After all, the *AT&T* lawsuit was based on the premise that a corporation that enjoyed a monopoly on local calls would ineluctably leverage that bottleneck control in the interexchange (long distance) market. *See id.* at 142, 188-89. The Bell System was *for that reason* broken up; the local monopolies were taken away from AT&T. (Of course, "AT&T" is a different entity after the decree than it was before.) To claim that AT&T has no interest under the decree in challenging one or more of the

Company's "return" to the interexchange market, there to compete against AT&T with the same sort of local monopoly leverage that caused the government to bring suit against AT&T in the first place, has an ironic, even Kafkaesque, quality. By the appellants' logic, if the BOCs' proposed entry into the interexchange market was *likely* to impede competition (which would violate the section VIII(C) test) but not *certain* to do so (thus surviving section VII's public interest test), and if the government did not object, the district judge would be obliged to permit the entry. Are we to believe that AT&T had in 1982, and has today, no interest in effectively objecting to such a proposal?

The dissent responds to our question in the negative. Judge Williams argues that AT&T has no institutional interest in *competition* in the interexchange market, and thus to read the decree to allow AT&T to object to any sort of BOC entry into that market—including a complete and full-scale entry—is to sanction a broad "allocation" of telecommunications markets in contradiction to the purpose of the antitrust laws. Dissent at 1-2. That argument, which has the virtue of boldly confronting the core problem with appellants' case (even if it is an argument that neither appellants nor the government dare make), is nothing less than an attack on the very premise of the consent decree. AT&T today, after all, has the same economic interest vis-a-vis the BOCs' effort to gain access to the interexchange market that MCI (the company that first sought to compete against the Bell System in the interexchange market) had at the time the government's lawsuit was brought against the Bell System. MCI then, and both AT&T and MCI now, seek to confine the BOCs to that por-

tion of the telecommunications market in which they enjoy a historical natural monopoly.

Certainly there is nothing in the language of the decree that suggests that AT&T should be thought unconcerned with the line-of-business restrictions, so that it should be regarded as not a "real" party with respect to those matters. It is not, as our dissenting colleague puts it, that we "assume[] that just because the Department of Justice and AT&T are parties to the same contract, and both have interests in the line-of-business restrictions (one acting for the public, the other for its shareholders), it follows that they must have identical rights in relation to those restrictions." Dissent at 5. To the contrary, section III treats AT&T as a formal party to the *entire* decree,[12] with specific authority under section VII to demand enforcement of *any* section of the agreement. Indeed, in a 1987 filing in the district court, the government stated that AT&T "ha[s] the right to seek enforcement [of a line-of-business restriction] . . . itself at any time," citing section

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[12] Section III provides in relevant part (with emphasis added):

> The provisions of this [decree] applicable to *each* defendant and each BOC, shall be binding upon said defendants and BOCs, their affiliates, successors and assigns, ...

The dissent makes the interesting point that under our reading of the decree, a BOC would be able to contest another BOCs' effort to relax a line-of-business restriction. *See* Dissent at 5. That may seem an unlikely occurrence today, but, in any event, we see no reason why that would necessarily be thought undesirable. We will await a concrete case, however, to say any more on that scenario.

VII.[13] Nor have we been shown any precedent applying a variable standard to judge a suggested modification of general language of a decree, depending on which party objects.[14]

Appellants have, nevertheless, combed the multitude of documents filed and hearing transcripts generated during the decree approval proceedings and have found numerous examples of Bell System representatives (who now work for AT&T) professing opposition to the line-of-business restrictions or acceptance of them simply as a step towards an overall settlement. Appellees in turn point to some statements demonstrating more affirmative interest in the prohibitions. But what are we to make of these offerings? After all, the Bell System (pre-divestiture AT&T) had been defending itself for decades—and presumably would have continued defending itself if the settlement negotiations failed—on the ground

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[13] Section VIII(G), which Judge Williams reads as establishing a "clear entitlement[]" for AT&T to move for judicial resolution, Dissent at 3, speaks of actions by "a party or a BOC"—virtually mirroring the "any of the parties . . . [or] a BOC" language of section VII.

[14] *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502 (1941), upon which the BOCs rely, seems if anything to cut against their position. There the Supreme Court reversed in relevant part a district court opinion approving a proposed antitrust decree modification (apparently under the public interest test; the decree contained no provision like section VIII(C)) with instructions to "adjust *the right which belongs to Panhandle* with full regard to that public interest which underlay the original suit." *Id.* at 509 (emphasis added). Panhandle's opposition to the change was not, therefore, considered irrelevant—as appellants would have us consider AT&T's—even though Panhandle was merely an *intervenor* whose rights under the decree were expressly limited.

that vertical integration of telecommunications businesses is efficient and pro-competitive. The Bell System representatives also faced a significant inherent conflict of interest: post-divestiture AT&T, as an interexchange carrier and equipment manufacturer, would obviously favor a complete prohibition on competition from the powerful local monopolies, while the post-divestiture BOCs would undoubtedly desire no such restrictions. The Bell System's duty at the time was, of course, to maximize the combined future value of AT&T and the BOCs for its (and soon to be their) shareholders. *See United States v. Western Elec. Co.*, 797 F.2d 1082, 1088 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 922 (1987). Perhaps to satisfy that obligation perfectly was psychologically impossible, but we presume that the negotiators fulfilled their duty and thus that the decree, and especially the section II(D) prohibitions at its core, represents a balanced amalgamation of benefits to and burdens upon both AT&T and the BOCs. For that reason, we think recourse to the decree's bargaining history to interpret how those who were negotiating for the *unified* Bell System saw the benefits and burdens distributed between post-divestiture AT&T and the BOCs is of little use today. *Cf. Triennial Review Opinion*, 900 F.2d at 293 (decree negotiating history may be useful in other contexts).[15]

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[16] Even were we to determine that AT&T must assert a cognizable and unique interest (vis-a-vis other interexchange carriers) in the CCS waiver in order to be entitled to put the BOCs to their proof under Section VIII(C), it appears that AT&T would qualify. Pursuant to the reorganization plan implementing the decree, the Bell System's widespread signaling facilities were allocated to AT&T; these assets would be devalued—and therefore AT&T's "rights," narrowly expressed, would be infringed—if the BOCs could provide sig-

The Justice Department, although it does not go so far as our dissenting colleague in challenging the consent decree as an anti-competitive division of the telecommunications industry, does caution that we should not "interpret" the decree to give AT&T a "strong incentive to oppose pro-competitive decree modifications in order to protect itself from the very competition such modifications could promote." This contention is, as the dissent elaborates, sort of a variation on the antitrust injury doctrine. *See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-13 (1986). But if, as the dissent suggests, AT&T should not be thought to have "antitrust standing" to assert its apparent rights under the decree because the BOCs' entry into the interexchange market would come at AT&T's expense, Dissent at 8-9, then it follows that MCI should not have had standing to file suit, *see MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), or to complain to the Justice Department, concerning the Bell System's activities in the interexchange market in the first place. That AT&T is now the largest carrier in the interexchange market hardly immunizes it against antitrust injury from new competitors who are monopolists in the local exchange markets. The flaw in our colleague's reasoning, we respectfully suggest, is that he entirely ignores the potential anti-competitive leverage that the BOCs' monopoly position in the

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naling on a centralized basis so that other interexchange carriers were spared the costs of investing in such far-flung facilities. As we have indicated, however, we do not think such a particular examination of AT&T's rights and interests is called for under the decree in order to conclude that AT&T has every right to force a section VIII(C) examination of the CCS proposal.

bottleneck local markets affords their entry into the interexchange markets.[16]

Insofar as the government believes that there are pro-competitive aspects of a BOC's proposed "reentry" into part or all of the interexchange market, it can aid the BOC in seeking to meet the section VIII(C) test by showing that the proposal will enhance rather than impede competition. The government expresses particular concern that AT&T might somehow use its rights under section VIII(C) to handicap its *existing* interexchange competitors by making it more difficult for the BOCs to provide services to those competitors in the interexchange market. We note, however, that AT&T's fiercest competitor, MCI, supports AT&T's construction of the decree, and that although the BOCs claim that AT&T's smaller competitors would benefit from both the CCS proposal and their construction of the decree, none of those companies appeared before us. It should be remembered that section VIII(C) does not give AT&T the power to veto truly pro-competitive line-of-business modifications, only to block those changes that are quite possibly, though not certainly, anti-competitive.

In any event, as MCI observes, the question before us is not how we would fashion the decree if we were writing on a clean slate. The decree is not ambiguous; it gives AT&T the right, as a party to the decree, to assert its objection to the BOCs' proposal and thus to invoke section VIII(C). Until this case, the gov-

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[16] Of course, in this case, as we discuss further below, the BOCs are not just *entering* a competitive market, they are expanding the boundaries of their monopolies to render a portion of the interexchange market apparently non-competitive. *See infra* page 25.

ernment never even suggested that the decree could be read otherwise.

We are thus persuaded by AT&T's argument that the CCS waiver must be judged according to section VIII(C)'s standard, for whenever a modification implicates the line-of-business restrictions and is contested by *any* of the parties to the decree, the section VIII(C) test governs.[17] Even if we had doubts, however, we think our prior decisions in the *Triennial Review* and *NYNEX Procurement* cases would deter us from accepting appellants' argument. It may be, as the BOCs contend, that the premise we here reaffirm —that AT&T's opposition makes a line-of-business modification "undeniably 'contested,'" *Triennial Review Opinion*, 900 F.2d at 292, regardless of the government's position—was not forcefully argued in those cases. The BOCs did assert to the district court in *Triennial* that AT&T had no interest under the decree in the line-of-business restrictions. On appeal, the Companies referenced that argument but emphasized the converse point—that AT&T's acquiescence in the removal of the information services ban left that proposal uncontested (notwithstanding the opposition of other interexchange carriers that were not decree parties). We were, therefore, clearly focused on the significance of AT&T's position, and *but for* AT&T's opposition, we would have reversed and remanded the manufacturing portion of *Triennial* just as we did the information services portion. Indeed, in discussing the latter proposal, we explained

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[17] It is therefore again unnecessary to decide what standard would govern a contested modification proposal, filed under section VII and either brought by or supported by the government, that does not implicate section II(D). *See Triennial Review Opinion*, 900 F.2d at 294 n.12.

that "[f]or purposes of identifying the proper standard of review, the critical point is that neither AT&T nor the DOJ opposed the . . . motion." *Id.* at 305 n.27 (emphasis omitted). And in the *NYNEX Procurement Opinion* we again viewed AT&T's position as pivotal, directing the district court on remand to apply the section VIII(C) standard if AT&T had properly contested the (government-supported) waiver. *See* 907 F.2d at 1209.

The proposition that AT&T's position on a proposed line-of-business modification can be determinative of whether the section VIII(C) test applies has thus been a linchpin of two of our opinions. Although it is true that we cannot be said to have *held* that AT&T's opposition makes a requested modification contested—because the point was not directly controverted—we do not think that the Companies can opportunistically, after so much litigation involving *the same parties*, switch their position and challenge that proposition at this late date. *Cf. Northwestern Ind. Tele. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989), *cert. denied*, 493 U.S 1035 (1990); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-90 (D.C. Cir. 1984) (per curiam).

III.

The appellants' submissions to the district court were not clearly focused on the section VIII(c) test—that is, on demonstrating that the CCS waiver posed no substantial possibility of impeding competition in the interexchange services market. Nor are their appellate briefs primarily directed to this point. We are rather disappointed, particularly in light of our remarks in the *Triennial Review Opinion* as to the

importance of the DOJ's predictive economic analysis, *see* 900 F.2d at 297-98; *accord NYNEX Procurement Opinion*, 907 F.2d at 1209, that the Department's market analysis in this case was so perfunctory. *See Reconsideration Opinion*, Mem. at 2. Based on the existing record, we do not see how the district judge's conclusion that the Companies' proposed waiver does not meet the section VIII(C) test, *see Waiver Opinion*, 131 F.R.D. at 652, can be thought erroneous. *See Triennial Review Opinion*, 900 F.2d at 293-94 (discussing standard of review in section VIII(C) cases).

In the *Triennial Review Opinion*, we determined that the BOCs cannot "impede competition," as that phrase is used in section VIII(C), unless they will possess market power—the ability to restrict output and/or raise prices—in the market they seek to enter via the proposed decree modification. *See* 900 F.2d at 296. Although neither the parties nor the district court performed a detailed market definition, it appears, as we have noted, *see supra* note 11, that the CCS waiver would allow the BOCs to enter the interexchange services market.[18] The district court determined that by transmitting network control signals across LATA boundaries, the BOCs would "adversely affect" a "vital" aspect of existing interexchange competition: interexchange carriers can, and apparently do, compete on the basis of being able to provide over the widest area the superior "network architecture, improved billing, new and unique services, faster call set-up," and other advantages of CCS

[18] We do not foreclose reexamination of the market definition in future cases, however. It may be that there are relevant submarkets or a developing signaling market, although none has been identified thus far.

signaling. *Waiver Opinion*, 131 F.R.D. at 650; *see also Reconsideration Opinion*, Mem. at 2. The submissions of the DOJ and Ameritech (in a filing signed by the Companies' appellate counsel) also conceded that signaling can be used in differentiating interexchange service.

The BOCs contend, however, that they merely want to offer an existing exchange access service—the provision of network control signaling—in a very similar (same content and ultimate destination, different interconnection point) but much more efficient manner. This would not "impede competition" in any *meaningful* way, they claim, because they would still lack market power in the interexchange services market as a whole. There would be no control over output, it is asserted, because the decree requires the Companies to provide signaling with every interexchange call, however many there are. As for price, appellants suggest that the cost of interexchange calls would in fact decline because the Companies would not be required to install and operate expensive and unnecessary STP pairs in every LATA (and will pass on the savings as lower access charges), nor would interexchange carriers have to invest in CCS links to every LATA. Appellees and the district court simply failed to confront, appellants argue, this absence of market power. Section VIII(C), however, places the burden of proof on the BOCs, *see NYNEX Procurement Opinion*, 907 F.2d at 1208; *Triennial Review Opinion*, 900 F.2d at 304, and we think that they (even with the DOJ's assistance) have not carried that burden.

In our previous cases, the BOCs sought to enter all or part of a section II(D) market in order to compete with the companies already in that market.

See, e.g., NYNEX Procurement Opinion, 907 F.2d at 1209 (observing that NYNEX wanted to compete with the thousands of firms already in the telecommunications equipment distribution market). Here, by contrast, the BOCs hope to take a piece of the interexchange market completely out of competition. If the CCS waiver is granted, the Companies' putative "competitors"—the interexchange carriers that currently provide inter-LATA signaling services—will be able to obtain CCS signaling *only* at centralized points, at whatever access charge the Companies demand (subject, as are the Companies' other monopoly services, to government regulation).[19] And the slice of interexchange competition foreclosed, even if narrow today, could prove difficult to confine. *See Waiver Opinion*, 131 F.R.D. at 651; *see also Triennial Review Opinion*, 900 F.2d at 309 n.29 (noting concern over "the practical difficulty of enforcing a merely *partial* repeal of [a section II(D)] ban" (emphasis in original)).

Appellants claim that any reduction in interexchange services competition will be insignificant because many small interexchange carriers cannot afford to install CCS links to every LATA, leaving only AT&T and perhaps a couple of other carriers offering CCS services to those areas—which is hardly the basis for vigorous competition. To the extent that appellants contend that the decree should be inter-

[19] Access charge regulation is also relevant to the concern that a BOC foothold in the interexchange market would create an incentive for exchange access discrimination against certain interexchange carriers. *See Waiver Opinion*, 131 F.R.D. at 651. The uncertain effectiveness of existing regulation was a principal reason for our denying the Companies' full-fledged entry into the interexchange services market in the *Triennial Review* case. *See* 900 F.2d at 300-01.

preted to aid the minnows against the trout, such as AT&T and MCI (effectively devaluing the investments those companies have made in extending their CCS networks to more LATAs), they are simply wrong. *See Waiver Opinion*, 131 F.R.D. at 652 (citing *Triennial Review Opinion*, 900 F.2d at 296). To the extent that appellants argue that without centralized STPs *no* competition over interexchange CCS signaling will exist in *some* LATAs, their position is undercut by their insistence on a blanket, nationwide waiver rather than transitional waivers for only those particular LATAs—waivers that AT&T has stated it would not oppose and that we too would be likely to view sympathetically, *see Gateway Opinion*, 907 F.2d at 164-65; *see also LATA Opinion*, 569 F. Supp. at 996 n.27, 1004 n.62 (noting that LATAs were intended to be large enough to cost-justify service by several interexchange carriers and not just AT&T).

We are quite skeptical, moreover, about the principal benefit claimed by the appellants—the costs that the BOCs could avoid if the CCS waiver were granted —because even if the savings were large,[20] they might be entirely irrelevant to the section VIII(C) analysis. Savings passed on to the Companies' local ratepayers (or shareholders) would not provide any competitive

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[20] The district court discounted the significance of the savings. *See Waiver Opinion*, 131 F.R.D. at 650 & n.7. And intervening developments appear to support the view that installing STP pairs in every LATA is not cost-prohibitive (if perhaps not most cost-efficient). These include the Companies' ongoing deployment of additional STP pairs and the FCC's recent order effectively requiring the Companies to provide CCS interconnection in virtually every LATA by April 1993 to allow "portability" of 800 numbers, *see Provision of Access for 800 Service* (CC Docket No. 86-10), FCC 91-249 (released Sept. 4, 1991).

benefit to the market the Companies seek to enter. *See Triennial Review Opinion*, 900 F.2d at 296. Only if the savings were passed on to the interexchange carriers (and then to their customers) would prices for interexchange calls be affected. Appellants have not demonstrated that any savings from the CCS waiver would necessarily (or even likely) result in lower (or even stable) access charges.

* * * *

Perhaps a stronger case can be made than that which the appellants mounted, but on this record the judgment of the district court is affirmed.

It is so ordered.

WILLIAMS, *Circuit Judge*, dissenting: The 1982 consent decree resolving the Department of Justice's protracted antitrust suit against the Bell System included so-called "line of business" restrictions. See Section II(D) of the decree. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), decree published, *id.* at 226-34. These bar each of the Bell Operating Companies (the "BOCs") from entering specified sections of the telecommunications industry. Hitherto, so far as I know, Section II(D) has not been recognized as a market-allocation agreement between the separate firms into which the Bell System was split—new AT&T (which I call simply AT&T, referring to the pre-decree entity as the Bell System) and the BOCs. The court's present decision gives Section II(D) that effect.

Narrowly conceived, the issue is which of three possible standards established by our decision in *United States v. Western Elec. Co.*, 900 F.2d 283, 305-07 (D.C. Cir. 1990) ("*Triennial Review*"), should govern a request by the BOCs to relax the line of business restrictions when the United States Department of Justice, *sole plaintiff* in the original antitrust suit, *favors* the change: (A) For "uncontested" modifications, the "public interest" standard of the Tunney Act (15 U.S.C. § 16(b)-(h) (1988)) controls, calling for approval if the change is "within the reaches of the public interest". See Maj. Op. at 10. (B) For "contested" modifications there are two alternatives. Changes in the BOC "line of business" restrictions are governed by Section VIII(C), requiring the applying BOC to show that there is "no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter"; other contested changes are governed by

United States v. Swift & Co., 286 U.S. 106, 119 (1932), requiring "a clear showing of grievous wrong evoked by new and unforeseen conditions". As the proposed changes are in the definition sections that give meaning to Section II(D)'s "line of business" provisions, the real choice here is between the "public interest" standard and Section VIII(C). See Maj. Op. at 13-14. Under *Triennial Review*, Section VIII(C) controls only if the change is "contested" within the meaning of that opinion.

The majority here rules that AT&T's opposition is enough of a "contest" to make a line-of-business change "contested" even when the Department of Justice approves. Thus the rump of the original *defendant*, a firm that has no institutional interest in favoring competition in interexchange markets, simply by crying *nyet* can displace the standard normally governing changes that are not contested by the original plaintiff. While it is of course true that the "line of business" restrictions originated in the Justice Department's belief that they were necessary to *facilitate* competition, the Department believes that the modifications here proposed "would promote interexchange competition". Brief of United States at 38. The upshot is that restraints originally devised in the name of enhancing competition have now become a private anticompetition agreement between potential competitors (AT&T and the BOCs), to be cheerfully enforced by the courts at the behest of a private party that (naturally) resists intrusion on its turf.

* * * *

The starting place for any possible AT&T entitlement to shift the applicable standard is obviously the agreement itself. The only material language—apart

from the substantive provisions themselves—is in Section VII:

Retention of Jurisdiction

> Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

It is evident from the heading of this provision and its first six words that it was inserted to ensure that the district court would have jurisdiction over all disputes arising under the decree. It thus rejected the usual rule that the court of the original decree has no special position as to such disputes. *Washington Hospital v. White*, 889 F.2d 1294, 1299 (3d Cir. 1989), doubtless to achieve litigation economies for all participants. The balance of the sentence is aimed at assuring that *all* disputes arising under the decree could end up in the district court, and not just some. Thus the provision does not address the narrow issue of whether AT&T was to be considered "a formal party to the *entire* decree", Maj. Op. at 17 (emphasis in original), or (if it were) what specific rights AT&T thereby secured.

Nor is Section III of any help: "The Provisions of this [decree] applicable to each defendant, shall be binding upon said defendants and BOCs, their affiliates, successors and assigns . . . ." The section is

carefully phrased to make sure that the burdens imposed on then-present entities—and only those burdens—should reach any later components or offspring of the burdened firms. It says nothing about who is allowed to enforce any specific element of the decree. Compare Maj. Op. at 17-18 & n.12.

Some parts of the decree directly burden AT&T, such as Section I(D), barring post-divestiture AT&T acquisition of stock or assets of any of the BOCs. Some parts provide AT&T with clear entitlements, such as Section VIII(G)'s rule on how to resolve conflicts over the allocation of assets used before divestiture by both AT&T and a BOC, and Section II(B)'s ban on BOCs' discriminating between AT&T and others. (While doubtless arising out of concern about *pro*-AT&T discrimination, it is phrased so as to run both ways and no reason appears why it should not.) The substance of these burdens and benefits is such that we may safely infer that the parties intended that AT&T would be a party to their enforcement in every sense of the word. For these, AT&T's role as party scarcely depends on Section VII.

The logic of the line-of-business restrictions is quite different. They originated, as the majority correctly notes, Maj. Op. at 16, in the Justice Department's belief that the Bell System had used its local service monopoly to achieve market power in adjacent fields and its concern that the BOCs would do likewise. As such, the restrictions seek, perhaps ironically, to enhance competition by restricting competitive entry. Obviously such a device is rather delicate, even in the hands of the Justice Department or courts, as competitive values are on both sides of the issue. But as an agreement between private firms, the line-of-business restrictions of Section II(D) are

simply an agreement of potential competitors to divide the market—*i.e.*, a *per se* violation of the Sherman Act, see *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). We should be slow to give the section a role in such obvious tension with the purposes of the antitrust laws. Nothing in Section VII justifies our doing so.[1]

Of course the Department of Justice might conceivably have put its imprimatur on an agreement by which Bell divided itself and provided that all of the new firms would have contractual rights against competitive threats from each other. As the text of the decree suggests no such purpose, one might find it in the *structure* of the relations of the parties, and I gather that is the majority's purpose in its discussion of the Bell System's pre-break-up goals. Maj. Op. at 18-19. As the majority correctly observes, before divestiture the Bell management's duty and, presumably, intention were to maximize the System's value; with divestiture in prospect, this meant maximizing the combined value of the future AT&T and of the BOCs. See *id.* at 19. The majority apparently assumes that that must have entailed supporting enforcement power for AT&T, for it concludes that as it "presume[s] that the negotiators fulfilled their duty", there is no need to look at what was actually said about future AT&T's rights in the restrictions. *Id.*

In fact, however, there is no special reason to believe that the Bell System management would have

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[1] By contrast, the decree in *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502 (1941), "explicitly reserved certain rights" to Panhandle, *id.* at 504, and these were the rights that Panhandle sought to vindicate in court, see *id.* at 509. Thus the case is not relevant. Cf. Maj. Op. at 18 n.14.

been likely to think that the future AT&T's gain from any increment in restrictions would be enough to offset the BOCs' loss. Equally so for post-decree modifications; if the Bell management expected that relaxations would on a net basis decrease the value of the aggregate, it would have tried to give the future AT&T the special hold over VIII(C) changes that the court here finds; otherwise not. Either result is theoretically possible, depending on the relative abilities of the different Bell components to exploit the competitive advantages they enjoy in their own markets. But without detailed information about those advantages, there is nothing inherent in the pre-divorce structure of the Bell System that gives us a reason to impute to it a desire to secure such a special position for AT&T.

In one respect, the majority's view is in obvious contradiction with the structure of the Bell System as divestiture approached. Under the majority's view that the language of Section VII unambiguously gives AT&T rights to enforce and preserve the line-of-business rules, its reading must sweep in the BOCs as well. Thus *each BOC* is entitled to insist on the Section VIII(C) standard as to a line-of-business change sought by any other BOC, such as Ameritech's seeking some relaxation of restrictions that would enlarge the scope of its competition with NYNEX. But it is hard to see how such veto proliferation could be in any of the parties' interests—either the Department of Justice's interest in competition, or the Bell System's interest in maximizing its aggregate value.

The majority assumes that just because the Department of Justice and AT&T are parties to the same contract, and both have interests in the line-of-

business restrictions (one acting for the public, the other for its shareholders), it follows that they must have identical rights in relation to those restrictions. It is clear, however, that in multiple-party contracts not every party will necessarily have a right to enforce every duty of every other party; lines of entitlement may be single, not multiple. The general point about separate right-duty relations typically arises in a slightly different context, with a single obligee claiming that multiple obligors' duties are joint, so that it may enforce all its rights against either. In that context, courts do not create the kind of duty sprawl that the majority indulges here; the rights and obligations of each party may be several as well as joint, to whatever extent the parties intend. See Restatement (Second) of Contracts §§ 10, 288 & comment d (1981) ("if one party promises one performance, and another promises a different performance, each may be bound independently of the other and the promisee may be entitled to both performances"); 4 Corbin, Contracts §§ 926, 940 (1951). Compare *Over the Road Drivers, Inc. v. Transport Ins. Co.*, 637 F.2d 816 (1st Cir. 1980), which held that an insurer could not offset its debt to one of several insureds under a single policy by moneys owed to it by the other insureds. Even though there was a single policy and the insureds were closely related, the court found their rights and obligations distinct. It would follow that if one of the insureds had wanted to modify its obligations under the contract, the others would have no power to convert such an uncontested modification to a contested one (governed by *Swift* if the agreement were a consent decree)—even if in some way these others would be incidentally injured by the modification (for ex-

ample, if the modification would turn the insured that sought it into more of a competitive threat to the others). More generally, if various obligors (AT&T and the BOCs) are bound independently to one or more obligees (the Department of Justice, as well as each other), even in a single contract, each obligation runs only to those whom it was intended directly to benefit (and similarly the right to seek or oppose a modification of an obligation). An obligation will not run automatically to every party that might incidentally derive a benefit.

To the extent that the text and structure leave doubt, we should turn to "contemporaneous statements of [the decree's] objectives". *Triennial Review*, 900 F.2d at 306 (citations omitted). In fact, Bell expressed only hostility to the restrictions. Counsel for the Bell System told the district court prior to approval of the decree that the Bell System was "against restrictions" on the BOCs, and that it agreed to them only "because Justice required it as a part of the bargain." Joint Appendix ("J.A.") 181-82; see also *American Tel. & Tel. Co.*, 552 F. Supp. at 186 n.227. Bell also told the FCC that the restrictions were not "our idea. We'd be happy to have [the BOCs] unrestricted". See J.A. at 126-27. The statements that AT&T throws against these, and which the majority says demonstrate "more affirmative interest in the prohibitions", Maj. Op. at 19, are quite weak. In one set of comments to the district court Bell affirmed its commitment to the restrictions, but "as part of its overall bargain for the Decree", J.A. at 145, stressing that the Department of Justice promised periodic reviews, *id.* at 146. AT&T points to one filing with the court in which Bell defended

the decree against the contention that the BOCs would not be viable. *Id.* at 166-77. But this defense came right after a statement that Bell "has acknowledged the importance of [the] restrictions to the Justice Department's theory of this Decree. . . . [This] discussion[] will not be repeated here." *Id.* at 166. That Bell signed and defended the Decree, in the interest of avoiding the costs and risks of litigation, does not mean that it desired the restrictions, or even that it thought they mitigated the break-up. The contemporaneous evidence shows, on the contrary, that Bell was at least ambivalent and probably hostile to the restrictions.

The contract language, and the structure and history of the negotiation, do not support an inference that every one of the parties was given the right to obtain, through opposition to a change, application of the VIII(C) standard. That being so, we may search for default rules. The common law has addressed a cognate problem—whether those who acquire portions of a burdened estate may sue each other to enforce an equitable servitude benefiting a third party. The answer is no, unless the estate was subdivided pursuant to a common plan or scheme. See *Korn v. Campbell*, 192 N.Y. 490, 85 N.E. 687 (1908); American Law of Property § 9.34 (1952). Analogously, there is no reason to infer a power in AT&T (and each of the BOCs) to enforce the line-of-business restrictions. The policy in both cases is to deny strangers the legal means to interfere with each other's private affairs in the absence of a clear directive. More narrowly, by limiting the flow of the beneficial interest to successors of the original beneficiaries, it prevents the benefit from going to unintended parties; it thus enhances flexibility by allow-

ing the obligor to secure changes through negotiation with a relatively narrow class of parties—only those with a genuine expectation or reliance interest.

More acutely relevant is the antitrust standing doctrine, which requires an antitrust plaintiff to allege an "antitrust injury", i.e., one "of the type the antitrust laws were designed to prevent and that flows from that which makes defendant's acts unlawful." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). Rushing in at the behest of one whose interest lies in diminished competition is likely to "chill the very conduct the antitrust laws are designed to protect". *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (addressing predatory pricing claims). If a BOC were really to reduce competition in interexchange services, so that output were restricted and price increased, AT&T as the largest carrier in that market would benefit, *except* to the extent that the business acquired by the entering BOC cut into AT&T's. AT&T's opposition is thus at least as easily chalked up to fear of enhanced competition as to any genuine concern for its reduction. Here, as in *Cargill*, AT&T is really objecting to a potentiality of later anticompetitive conduct, of misbehavior after entry rather than any *antitrust injury* that would flow from entry itself. To read the decree as assigning AT&T special rights against modifications of the line-of-business rules is to allow it just the sort of preemptive strike against competition that the Court rejected in *Cargill*.[2]

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[2] The parties and this court seem to have assumed all along that AT&T has standing to challenge modifications in the

Of course the fact that the parties occupy adjacent fields does not mean in itself that one cannot have antitrust claims against conduct of the other, such as MCI's original "essential facilities" and predatory pricing claims against the Bell System. See *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983). Those are a far cry from the simple market division that AT&T seeks to enforce here. Compare Maj. Op. at 20.

The majority insists that here the modification would cause AT&T a genuine antitrust injury: the BOCs "are expanding the boundaries of their monopolies to render a portion of the interexchange market completely non-competitive." *Id.* at 20 n.16. But in fact the BOCs propose only to change the *means* of implementing the monopolies granted to them by state law, shifting to more efficient ways for handing off signals generated in their region to the interexchange carriers.

The majority also argues that its holding is required by precedent. *Id.* at 21-22. In *Triennial Review* and in *United States v. Western Electric Co.*, 907 F.2d 1205 (D.C. Cir. 1990) ("*NYNEX Procurement*"), this court applied (or directed the district court to apply) the Section VIII(C) standard to ana-

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line-of-business restrictions. Given its clear commercial interest, there seems little doubt that the Constitutional minimum is satisfied. See *Warth v. Seldin*, 422 U.S. 490, 498-502 (1972). As the Tunney Act gives the district judge a great deal of discretion when making a public interest determination to include various entities as parties, intervenors, amici, or any other kind of participant, 15 U.S.C. § 16(f)(3), prudential standing is also present. But to say that AT&T has standing to sue is not the same as saying that it has the power, by its opposition, to change the standard for approval of a modification.

lyze decree modifications proposed by the BOCs and DOJ and resisted by AT&T. In neither case, however, was it argued that Section VII should apply to such modifications, cf. Maj. Op. at 22 (chiding BOCs for failure to raise point in earlier litigation), and so in both cases the court assumed that Section VIII(C) applied without deciding the issue. The BOCs' reference on appeal in *Triennial Review* to AT&T's lack of opposition to the modification of the information services ban did not "clearly focus[]" the court on the issue, cf. Maj. Op. at 22, as no party was arguing that this lack of opposition foreclosed application of Section VIII(C). It may be that "*but for* AT&T's opposition, we would have reversed and remanded the manufacturing portion of *Triennial* [for application of Section VII] just as we did the information services portion", Maj. Op. at 22 (emphasis in original), but that assumes we would have seized upon an unraised issue. Cf. *Independent Ins. Agents of America v. Clarke*, 955 F.2d 731, 741-44 (D.C. Cir. 1992) (dissent).

* * * *

As the majority explains, the public interest standard—the common law standard for unopposed modifications of consent decrees—is quite relaxed. The proposed modification need only be "within the *zone of settlements* consonant with the public interest today." See *Triennial Review*, 900 F.2d at 307 (emphasis in original). Because the district court has not yet applied the correct standard, and because we sit as a court of review, I would remand the case to the district court for application of the proper standard for uncontested modifications.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5333

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
BELL ATLANTIC CORPORATION,
Appellant

and Consolidated Cases No. 90-5335, 90-5337,
90-5351, 90-5365, 90-5367 and 90-5373

Appeals from the United States District Court
for the District of Columbia

BEFORE: Silberman, Williams and Sentelle, Circuit Judges

JUDGMENT

[Filed July 24, 1992]

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in these causes is hereby affirmed, in accordance with the opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ [Illegible]
CONSTANCE L. DUPRE
Clerk

Date: July 24, 1992

Opinion for the Court filed by Circuit Judge Silberman

Dissenting opinion filed by Circuit Judge Williams

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0192 (HHG)

UNITED STATES OF AMERICA, PLAINTIFF

v.

WESTERN ELECTRIC COMPANY, INC., ET AL.,
DEFENDANTS

[Filed July 13, 1990]

MEMORANDUM

U S West, one of the Regional Companies, has filed a motion for a declaratory ruling, or in the alternative, for a waiver of the decree restrictions, to permit it to provide common channel signaling interconnection on a centralized basis in lieu of installing the requisite interconnection in every LATA. The other Regional Companies not only support the U S West request, but each of them asks for similar treatment on its own behalf. AT&T and MCI, on the other hand, oppose the motion, while the Department of Justice and several other interested parties, including some of the smaller interexchange carriers, oppose the declaratory judgment part of the motion but support the requests for waivers.

I

The requests for a declaratory judgment present little difficulty; it is plain under the decree that it must be denied. Signaling is and always has been an integral part of telecommunications traffic, including interexchange traffic. Moreover, each inter-LATA communication must include information with its signaling that dictates, in addition to the destination of the called party, the interexchange carrier selected to reach that party. On this basis, the decree specifically includes the "provision of network control signaling" in the definition of exchange access—a function which under the decree is to be performed by the Regional Companies. Section IV(F) of the decree.[1]

It is equally clear from the language of the decree that the Regional Companies are required to deliver exchange access traffic to the interexchange carriers at points of presence (POP) in every LATA. Section IV(F) explicitly directs that the exchange access services "shall be provided by facilities in [a LATA]" for the "delivery of and receipt of [interexchange traffic] at a point or points within the [LATA] designated by an interexchange carrier." And in its Opinion approving the AT&T plan of reorganization, the Court explained, once again, that the Regional Companies must "deliver traffic originating or terminating within a LATA to a point of presence (POP) within the LATA." *United States* v. *Western Electric Co.*, 569 F. Supp. 990, 994 and n.13 (D.D.C. 1983), *aff'd*, 464 U.S. 1013 (1983).

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[1] U S West concedes that the delivery of signaling to the interexchange carriers is an exchange access service, Motion at 9, and so does the Department of Justice. Memorandum at 2.

Surprisingly, in view of the Regional Companies' general opposition to decree construction based on purpose where the language of the decree is unambiguous,[2] U S West and the other Regional Companies argue, in effect, that the Court should disregard the decree language and instead focus on what they term its core objectives,[3] such as the public interest in an upgrade of the long distance networks and the cost and quality of telephone service.[4] These public interest factors, too, are considerations which the Regional Companies have vehemently argued in other contexts, and with some success, to be irrelevant. Thus, the Court of Appeals recently explained at the urging of the Regional Companies and the Department of Justice that, in construing the decree, this Court was not to consider such objectives as universal telephone service and hence the cost of such service to consumers.[5]

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[2] *See, e.g.*, Joint Reply Brief of Regional Companies in Court of Appeals Nos. 87-5388 et al. at 12 n.5. However, as this Court has had occasion to note several times, when it suits their business plans the Regional Companies have not been shy to rise above principle and to advocate judicial reliance on decree purpose. *See, e.g., United States* v. *Western Electric Co.*, 673 F. Supp. 525, 585 n.269. Emerson has said that a foolish consistency is the hobgoblin of little minds (*Essays: First Series* (18.41))—a criticism that could not legitimately be levelled at the Regional Companies.

[3] The Department of Justice likewise abandons its recent insistence on obedience to literal decree language, advocating that the Court ignore that language in this instance. Department of Justice Memorandum at 2.

[4] *See, e.g.*, U S West Memorandum at 8-9; NYNEX Comments at 10-11; Bell Atlantic Reply at 3-7.

[5] *See, e.g., United States* v. *Western Electric Co.*, 900 F.2d 283, 299-300 (D.C. Cir. 1990). That is not to say that on the

In any event, whatever these inconsistencies, what is altogether plain is that the decree language stands as a categorical obstacle to the Regional Companies' declaratory judgment requests.

II

Now as to the waiver. The Regional Companies and the Department of Justice explain that common channel signaling and Signaling System 7 (SS7-CCS), which is planned to be deployed this year or next,[6] uses a data network separate from the communications channel for transmission of network control signaling information, rather than transmitting that information over the channel used for the communication itself. The waivers should be granted, according to those supporting them, because it is now feasible to separate the signaling channels from those used for the transmission of the communications themselves, and because the installation of interfaces in just a few central points would be less expensive for the Regional Companies than the provision of the equipment in every LATA as the decree requires. *See, e.g.*, Department of Justice Memorandum at 7, 16-19; Ameritech Memorandum at 11; Bell Atlantic Reply at 3-4; Pacific Telesis Reply at 3-4; South-

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subject here under consideration the purposes of the decree and its language are not in agreement, for they are. This is a subject the Court explores below in its discussion of the requests for waivers.

[6] According to the Department of Justice, some of the Regional Companies are planning to make SS7 interconnection available beginning "perhaps as early as mid-1990, or in early 1991." *See* Memorandum at 6 and n.10. U S West plans on interconnection of the Regional Company CCS networks in the fall of 1990. U S West Reply at 12.

western Bell Comments at 18-20. The proponents of the waivers further argue that adherence to the decree would provide no advantage to the public. Department of Justice Memorandum at 19.

In the first place, it is most doubtful that the Court would be justified in light of recent appellate decisions to ignore the language of the decree in order to provide to the Regional Companies the collateral benefit of a savings of a relatively small amount of money.[7] Cost alone has never been regarded as a reason for deviating from the requirements of the decree. Divestiture was a costly process, and the costs involved were deemed justified in order to create a competitive market structure of benefit to consumers, to innovation, and to an American telecommunications industry spurred to optimum performance by the traditional disciplining tool of a capitalist economy—competition. Furthermore, the Regional Companies are hardly in a position to complain of the cost of complying with the divestiture decree: as a consequence of that decree, each of them

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[7] As has been pointed out, the cost to U S West, for example, of delivering service in each LATA as the decree requires will, by its estimate, be $60 million initially and $6 million annually. MCI Opposition at 12. However, this amount constitutes only .0085 of the $7 billion U S West has invested in its network since divestiture. *Id.* at 13. As MCI also correctly notes, "the proposition that the Regional Companies cannot afford to spend $60 million to comply with the judgment strains credulity in light of the billions of dollars Regional Companies already have invested, and continue to invest, in their exchange networks and in various unrelated businesses." *Id.* at 12. Moreover, not only does the $60 million figure appear to be inflated but, whatever the actual cost, it is likely to be recovered through local rates and access charges. *Id.* at 16.

inherited thriving businesses and many billions of dollars in assets.

III

Beyond that, the grant of waivers would adversely affect long distance competition. Signaling information is vital to such competition: network control signaling can be used by a company engaged in interexchange services to distinguish itself from its competitors in such areas as better network architecture, improved billing, new and unique services, faster call set-up, and more efficient operation in other areas. And since the CCS network is a data network it can also be used to provide data and information services to end users.

Thus, if the Regional Companies were permitted to engage in this obvious interexchange function and thereby to decide whether, where, when, and how to offer interexchange services, they would become the arbiters of interexchange services, and they could shape the competition in that field to suit their interests or even to frustrate it altogether.[8]

These factors have particular significance by virtue of the fact that each of the Regional Companies is deploying the same type of inter-LATA signaling network for which all of them now seek approval, and the companies are planning to interconnect their SS7 networks to create a nationwide Regional Company signaling system.[9] It also appears that these com-

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[8] *See United States* v. *Western Electric Co.*, 583 F. Supp. 1257, 1259 (D.D.C. 1984); 604 F. Supp. 316, 324 (D.D.C. 1985).

[9] *See* letters from E.J. Morea, NYNEX Material Enterprises to R. Santoro, MCI, of October 17, 1988, and letter from D. King, BellSouth Services to M. Van Zetta, MCI,

panies intend to offer revenue producing services (such as call completion to busy numbers on an inter-LATA basis) which represent the initial steps for commercial applications of signaling as a commodity.[10]

Almost since the date of the divestiture in 1984, the Regional Companies have consistently worked for, and expected that, notwithstanding the decree and the fact that there has been no significant change since the decree was entered, they would somehow be able to enter the interexchange business.[11] The companies have also, again almost from the first day, attempted to build upon the slightest concession from the Court as a springboard for claimed entitlements for further advances into prohibited lines of business. This Court has, on a number of occasions commented on this "slippery slope" syndrome. *See, e.g., United States* v. *Western Electric Co.*, 673 F. Supp. 525, 545 (D.D.C. 1987), *rev'd on other grounds*, 900 F.2d 283 (D.C. Cir. 1990). Moreover, the expectation of future competition with the interexchange carriers has always represented an incentive for present Regional Company discrimination. *See United States* v. *Western Electric Co.*, 592 F. Supp. 846, 867-68 (D.D.C.

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dated September 7, 1988, cited in MCI's Opposition at 17 n.32.

[10] There is no basis whatever for the claim that such commercial messages are "official" communications since they are being offered on a commercial, competitive basis. *See United States* v. *Western Electric Co., Inc.*, Civil Action No. 82-0192 (D.D.C. January 24, 1989), slip op. at 10-11.

[11] For the most recent manifestation, *see* Joint Brief for the Regional Telephone Company Appellants in Nos. 87-5388 et al.—*United States* v. *Western Electric Co.*, April 17, 1989, at 13-14.

1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985).

Not only is it likely that the grant of the current motions would lead to discrimination against the interexchange carriers, the anticipated competitors of the Regional Companies, but such discrimination has already taken place. Thus, the companies apparently plan to implement SS7 for their own data base services first, and accordingly they have delayed interexchange company testing that would permit these companies to position themselves in the same market. MCI Opposition at 19. Further, Regional Company centralized SS7 architecture will substantially degrade the quality of access available to the interexchange carriers, increasing call set-up time for each 800 call by as much as 4.2 seconds. MCI Opposition at 20 n.38.

It was the rationale of the decree, as it is the rationale of the antitrust laws, that the public will benefit from free competition, unfettered by monopolists. There is no question but that a waiver here, if granted, would injure the public, even as a grant of that waiver would save the Regional Companies some money.

IV

The Regional Companies respond that strict adherence to the decree will primarily benefit AT&T and MCI and may disadvantage the smaller interexchange carriers.[12] *See, e.g.*, U S West Reply at 9-11; Ameritech Memorandum at 10, 13-14; Bell Atlantic Reply at 7-8; BellSouth Motion at 14-15. The newly-

[12] Some of the smaller interexchange carriers make the same argument. *See* Teleconnect Response at 7-8; MidAmerican Response at 4.

founded solicitude of the Regional Companies for the smaller interexchange carriers is certainly touching; however, it cannot erase the long-established principle,[13] recently relied on by the Court of Appeals [14] that the antitrust laws in general and the decree in this case in particular are designed to benefit competition, not particular competitors.

V

Waivers under Section VIII(C) from the restrictions mandated by the decree are to be granted upon a showing by a Regional Company that "there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." *See United States* v. *Western Electric Co., Inc.*, 592 F. Supp. 842, 851 (D.D.C. 1984); *United States* v. *Western Electric Co.*, 900 F.2d 283, 291, 295-300 (D.C. Cir. 1990). For the reasons stated, it is the Court's conclusion that such showing has not been made but that, in addition to being offensive to the decree language, such waivers would be inconsistent with its purposes and would create a substantial possibility that the Regional Companies could

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[13] *See Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962).

[14] *See* 900 F.2d at 296. The Regional Companies, too, have relied on this principle many times. Thus, in the peroration of their Joint Reply Brief in the Court of Appeals, these companies argue that, by refusing to permit them to enter the lines of business prohibited to them by the decree, this Court has been engaged in the "ultimate antitrust fallacy of protecting competitors, not competition." Joint Reply Brief in No. 87-5388 et al., *United States* v. *Western Electric Co., Inc.*

use their monopoly power to impede competition in the market they seek to enter.

The motions are therefore hereby denied.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

July 13, 1990

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0192 (HHG)

UNITED STATES OF AMERICA, PLAINTIFF

v.

WESTERN ELECTRIC COMPANY, INC., ET AL., DEFENDANTS

MEMORANDUM AND ORDER

[Filed September 6, 1990]

On July 13, 1990, the Court denied the request of several of the Regional Companies for a waiver of the decree restriction against signaling information across LATA boundaries. U S West and Ameritech have moved for reconsideration of that ruling. The motions will be denied.

It is clear, and the Regional Companies do not appear to argue otherwise, that section IV(F) of the decree requires that network control signals be delivered within the originating LATA, and much of the discussion in the Regional Company papers regarding the standards for waivers of the line of business restrictions embodied in section II(D) is therefore besides the point. It is also clear that the transport of signaling messages over LATA boundaries is an interexchange function, and whatever else the

Court of Appeals decided in its April 3, 1990 opinion, it upheld the continuing validity of the restriction on entry of the Regional Companies into the interexchange market. *United States* v. *Western Electric Co.*, 900 F.2d 283, 301 (D.C. Cir. 1990). No cogent reasons have been advanced for a piecemeal dismantling of that restriction. On these bases alone, the motions for reconsideration must fail.

Equally unpersuasive are the Regional Companies' arguments that their provision of these services would be the most efficient method of providing them, and that they can draw substantial comfort from the support they received from the Department of Justice. Even if the argument bottomed on efficiency were correct—and there is no basis for concluding that it is—it would not override the antitrust rationale of the decree that the entry of the local monopolists with their stranglehold on exchange market would be destructively anticompetitive. As for the Department of Justice, it has not furnished economic evidence or predictions of market behavior adequate to persuade either this Court or the Court of Appeals that entry of the Regional Companies into the interexchange market is now justified.

The Regional Companies' motion is not well taken regardless of the standard and the decree provision that are applied—section IV(F), section VIII(C), section VII, or the common law standard for contested decree modifications.[1]

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[1] There is not the slightest support for the point made by some of the Regional Companies (*e.g.*, Ameritech Reply at 3) that whenever they and the Department of Justice agree on a modification, it is deemed to be uncontested, irrespective of AT&T's opposition.

For these reasons, it is this 6th day of September, 1990

ORDERED that the motions for reconsideration be and they are hereby denied.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1298 (HHG)

UNITED STATES OF AMERICA, PLAINTIFF

v.

GTE CORPORATION, DEFENDANT

MEMORANDUM AND ORDER

[Filed March 26, 1992]

GTE has filed a motion for a declaratory ruling, or in the alternative, for a waiver of the decree restrictions, to permit it to use Signaling System 7 (SS7) technology which employs facilities crossing LATA boundaries. GTE wants to use the SS7 facilities in providing alternate billing service validation service, Query Response Service, Data Base 800 Service, trunk signaling services, and similar services which may evolve using in the future using SS7 technology. AT&T and MCI are opposed to GTE's Motion. The Department of Justice supports a conditioned waiver.

SS7 is a common channel signaling system currently being deployed within the networks of the GTE operating companies, the Regional Companies, and interexchange carriers. SS7 technology uses a high speed data network that is separate from the

communications channel for both the transmission of network control signaling information and for obtaining from data bases information needed for call routing or screening. The SS7 facilities include Signal Transfer Points (STPs). GTE could install Signal Transfer Points and data bases in each of its 101 LATAs, but argues this is not economically feasible. GTE estimates the cost of doing so would be $1.515 billion.[1] GTE wants to install instead Signal Transfer Points in only nine LATAs, and use its own high speed data links to link their SS7 facilities.

I

GTE's request for a declaratory judgment is denied for reasons similar to this Court's denial of a US West motion for declaratory judgment on July 13, 1990.[2]

Delivery of network control signaling to the interexchange carriers is an exchange access service. The GTE decree specifically defines "exchange access" as including the provision of network control signaling. *United States* v. *GTE Corp.*, 1985-1 Trade Cas. (CCH) ¶ 66,355 (D.D.C. Dec. 21, 1984) at § II.G (hereinafter "GTE Decree").[3] The decree requires

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[1] GTE claims the cost of a mated pair of local Signal Transfer Points is approximately $5 million, and the cost of a mated pair of data bases is approximately $10 million. *GTE Motion for Declaratory Ruling* at 6.

[2] *United States* v. *Western Electric Co., Inc.*, Civ. Action No. 82-0192, *Memorandum* (July 13, 1990).

[3] GTE in fact states that "[e]ach of the functions which the GTOCs will provide with SS-7 technology is an exchange or exchange access service." *GTE Motion for Declaratory Judgment* at 22.

that exchange access services "shall be provided by facilities in an exchange or serving area" for the "delivery and receipt of such [interexchange] traffic at a point or points within an exchange or serving area designated by an interexchange carrier for the connection of its facilties with those of the GTOC." GTE Decree, § II.G. That is, under the plain language of the decree, GTE must provide this exchange access service at a point of presence within each LATA, and accordingly GTE's declaratory judgment request must be denied.

II

GTE requests in the alternative a waiver of the decree pursuant to Section VII.A of the decree. GTE stresses some of the factual differences between it and the Regional Companies. GTE serves 101 LATAs which is far more than are served by any of the Regional Companies. The cost to GTE of installing STPs and/or data bases in each of its 101 LATAs therefore would be far higher than the analogous cost for a Regional Company, amounting to well over $1 billion.[4] GTE's operations are more national in scope and serve primarily the nation's rural and suburban areas, in contrast to the concentration of much of the Regional Companies' service in urban areas.[5]

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[4] By contrast, the cost to US West of delivering service within each LATA was estimated at $60 million initially. *See United States* v. *Western Electric Co., Inc.*, Civ. Action No. 82-0192 *Memorandum* (July 13, 1990) at 6 n.7.

[5] GTE also stresses that the appropriate standard for a waiver when all parties support one is "whether the resulting array or rights and liabilities comports with the 'public interest.'" *United States* v. *Western Elec., Co.*, 900 F.2d 283, 305 (D.C. Cir. 1990).

While the *AT&T* decree and the *GTE* decree have generally been treated in parallel fashion, this need not be done where, as here, there is a fundamental, substantive difference between the two situations. Accordingly, the waiver to GTE will be granted.

As to GTE's request for a waiver to utilize inter-LATA queries in connection with LIDB calling card validation and 800 database access service, a waiver consistent with that granted by the Court on February 10, 1992 for the Regional Companies will also be granted.

GTE also requests a blanket ruling on "any similar services which may evolve using SS7 technology." This Court concurs with the Department of Justice that such a request is too broad and speculative to warrant a ruling at this time. *See Response of the United States* at 2 n.5.

Accordingly, it is this 25th day of March 1992

ORDERED that the motion by GTE for a declaratory ruling be and it is hereby denied; and it is further

ORDERED that any GTE local exchange company (GTOC) that utilizes common channel signaling (CCS) to provide network control signaling as part of its exchange access services is not required to deliver and receive such CCS signaling within the LATA where a call originates or terminates, nor is a GTOC required to install a common channel signaling interface in each of its LATAs. A GTOC may deliver CCS for exchange access, *i.e.*, network control signaling, to interexchange carriers and other exchange access customers at centralized interfaces within its region, and a GTOC may transport such signaling between LATAs within its region for that purpose.

PROVIDED, however, that, at the request of any exchange access customer, a GTOC that provides CCS network control signaling at centralized interface points as permitted by this order shall sort such signaling as appropriate, in accordance with SS7 or other applicable protocols, for routing to the exchange access customer's Signal Transfer Points or network switches; and it is further

ORDERED that as to transporting 800 and LIDB queries, GTE may act consistently with this Court's order of February 10, 1992.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX F

AT&T CONSENT DECREE
[Approved August 24, 1982]*

MODIFICATION OF FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on January 14, 1949; the defendants having appeared and filed their answer to such complaint denying the substantive allegations thereof; the parties, by their attorneys, having severally consented to a Final Judgment which was entered by the Court on January 24, 1956, and the parties having subsequently agreed that modification of such Final Judgment is required by the technological, economic and regulatory changes which have occurred since the entry of such Final Judgment;

Upon joint motion of the parties and after hearing by the Court, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Final Judgment entered on January 24, 1956, is hereby vacated in its entirety and replaced by the following items and provisions:

I

AT & T Reorganization

A. Not later than six months after the effective date of this Modification of Final Judgment, defendant AT & T shall submit to the Department of Jus-

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* This decree is reprinted in *United States* v. *AT&T*, 552 F. Supp. 131, 226-232 (D.D.C. 1982), aff'd sub nom. *Maryland* v. *United States*, 460 U.S. 1001 (1983). The decree also contains Appendices, which are not reprinted here. See 552 F. Supp. at 232-234.

tice for its approval, and thereafter implement, a plan of reorganization. Such plan shall provide for the completion, within 18 months after the effective date of this Modification of Final Judgment, of the following steps:

1. The transfer from AT & T and its affiliates to the BOCs, or to a new entity subsequently to be separated from AT & T and to be owned by the BOCs, of sufficient facilities, personnel, systems, and rights to technical information to permit the BOCs to perform, independently of AT & T, exchange telecommunications and exchange access functions, including the procurement for, and engineering, marketing and management of, those functions, and sufficient to enable the BOCs to meet the equal exchange access requirements of Appendix B;

2. The separation within the BOCs of all facilities, personnel and books of account between those relating to the exchange telecommunications or exchange access functions and those relating to other functions (including the provision of interexchange switching and transmission and the provision of customer premises equipment to the public); provided that there shall be no joint ownership of facilities, but appropriate provision may be made for sharing, through leasing or otherwise, of multifunction facilities so long as the separated portion of each BOC is ensured control over the exchange telecommunications and exchange access functions;

3. The termination of the License Contracts between AT & T and the BOCs and other subsidiaries and the Standard Supply Contract between Western Electric and the BOCs and other subsidiaries; and

4. The transfer of ownership of the separated portions of the BOCs providing local exchange and exchange access services from AT & T by means of a spin-off of stock of the separated BOCs to the shareholders of AT & T, or by other disposition; provided that nothing in this Modification of Final Judgment shall require or prohibit the consolidation of the ownership of the BOCs into any particular number of entities.

B. Notwithstanding separation of ownership, the BOCs may support and share the costs of a centralized organization for the provision of engineering, administrative and other services which can most efficiently be provided on a centralized basis. The BOCs shall provide, through a centralized organization, a single point of contact for coordination of BOCs to meet the requirements of national security and emergency preparedness.

C. Until September 1, 1987, AT & T, Western Electric, and the Bell Telephone Laboratories, shall, upon order of any BOC, provide on a priority basis all research, development, manufacturing, and other support services to enable the BOCs to fulfill the requirements of this Modification of Final Judgment. AT & T and its affiliates shall take no action that interferes with the BOCs' requirements of nondiscrimination established by section II.

D. After the reorganization specified in paragraph I(A)(4), AT & T shall not acquire the stock or assets of any BOC.

II

BOC Requirements

A. Subject to Appendix B, each BOC shall provide to all interexchange carriers and information

service providers exchange access, information access, and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT & T and its affiliates.

B. No BOC shall discriminate between AT & T and its affiliates and their products and services and other persons and their products and services in the:

1. procurement of products and services;

2. establishment and dissemination of technical information and procurement and interconnection standards;

3. interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service; and

4. provision of new services and the planning for and implementation of the construction or modification of facilities, used to provide exchange access and information access.

C. Within six months after the reorganization specified in paragraph I(A)(4), each BOC shall submit to the Department of Justice procedures for ensuring compliance with the requirements of paragraph B.

D. After completion of the reorganization specified in section I, no BOC shall, directly or through any affiliated enterprise:

1. provide interexchange telecommunications services or information services;

2. manufacture or provide telecommunications products or customer premises equipment (except for provision of customer premises equipment for emergency services); or

3. provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff.

III

Applicability and Effect

The provisions of this Modification of Final Judgment, applicable to each defendant and each BOC, shall be binding upon said defendants and BOCs, their affiliates, successors and assigns, officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with each defendant and BOC who receive actual notice of this Modification of Final Judgment by personal service or otherwise. Each defendant and each person bound by the prior sentence shall cooperate in ensuring that the provisions of this Modification of Final Judgment are carried out. Neither this Modification of Final Judgment nor any of its terms or provisions shall constitute any evidence against, an admission by, or an estoppel against any party or BOC. The effective date of this Modification of Final Judgment shall be the date upon which it is entered.

IV

Definitions

For the purposes of this Modification of Final Judgment:

A. "Affiliate" means any organization or entity, including defendant Western Electric Company, Incorporated, and Bell Telephone Laboratories, Incorporated, that is under direct or indirect common ownership with or control by AT & T or is owned

or controlled by another affiliate. For the purposes of this paragraph, the terms "ownership" and "owned" mean a direct or indirect equity interest (or the equivalent thereof) of more than fifty (50) percent of an entity. "Subsidiary" means any organization or entity in which AT & T has stock ownership, whether or not controlled by AT & T.

B. "AT & T" shall mean defendant American Telephone and Telegraph Company and its affiliates.

C. "Bell Operating Companies" and "BOCs" mean the corporations listed in Appendix A attached to this Modification of Final Judgment and any entity directly or indirectly owned or controlled by a BOC or affiliated through substantial common ownership.

D. "Carrier" means any person deemed a carrier under the Communications Act of 1934 or amendments thereto, or, with respect to intrastate telecommunications, under the laws of any State.

E. "Customer premises equipment" means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications, but does not include equipment used to multiplex, maintain, or terminate access lines.

F. "Exchange access" means the provision of exchange services for the purpose of originating or terminating interexchange telecommunications. Exchange access services include any activity or function performed by a BOC in connection with the origination or termination of interexchange telecommunications, including but not limited to, the provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, directory services, testing and maintenance

of facilities and the provision of information necessary to bill customers. Such services shall be provided by facilities in an exchange area for the transmission, switching, or routing, within the exchange area, of interexchange traffic originating or terminating within the exchange area, and shall include switching traffic within the exchange area above the end office and delivery and receipt of such traffic at a point or points within an exchange area designated by an interexchange carrier for the connection of its facilities with those of the BOC. Such connections, at the option of the interexchange carrier, shall deliver traffic with signal quality and characteristics equal to that provided similar traffic of AT & T, including equal probability of blocking, based on reasonable traffic estimates supplied by each interexchange carrier. Exchange services for exchange access shall not include the performance by any BOC of interexchange traffic routing for any interexchange carrier. In the reorganization specified in section I, trunks used to transmit AT & T's traffic between end offices and class 4 switches shall be exchange access facilities to be owned by the BOCs.

G. "Exchange area," or "exchange" means a geographic area established by a BOC in accordance with the following criteria:

1. any such area shall encompass one or more contiguous local exchange areas serving common social, economic, and other purposes, even where such configuration transcends municipal or other local governmental boundaries;

2. every point served by a BOC within a State shall be included within an exchange area;

3. no such area which includes part or all of one standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States) shall include a substantial part of any other standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States), unless the Court shall otherwise allow; and

4. except with approval of the Court, no exchange area located in one State shall include any point located within another State.

H. "Information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or other symbols.

I. "Information access" means the provision of specialized exchange telecommunications services by a BOC in an exchange area in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services. Such specialized exchange telecommunications services include, where necessary, the provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, testing and maintenance of facilities, and the provision of information necessary to bill customers.

J. "Information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunica-

tions system or the management of a telecommunications service.

K. "Interexchange telecommunications" means telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area.

L. "Technical information" means intellectual property of all types, including, without limitation, patents, copyrights, and trade secrets, relating to planning documents, designs, specifications, standards, and practices and procedures, including employee training.

N. "Telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services.

O. "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received, by means of electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission.

P. "Telecommunications service" means the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities.

Q. "Transmission facilities" means equipment (including without limitation wire, cable, microwave, satellite, and fibre-optics) that transmit information by electromagnetic means or which directly support

such transmission, but does not include customer premises equipment.

V

Compliance Provisions

The defendants, each BOC, and affiliated entities are ordered and directed to advise their officers and other management personnel with significant responsibility for matters addressed in this Modification of Final Judgment of their obligations hereunder. Each BOC shall undertake the following with respect to each such officer or management employee:

1. The distribution to them of a written directive setting forth their employer's policy regarding compliance with the Sherman Act and with this Modification of Final Judgment, with such directive to include:

(a) an admonition that non-compliance with such policy and this Modification of Final Judgment will result in appropriate disciplinary action determined by their employer and which may include dismissal; and

(b) advice that the BOCs' legal advisors are available at all reasonable times to confer with such persons regarding any compliance questions or problems;

2. The imposition of a requirement that each of them sign and submit to their employer a certificate in substantially the following form:

> The undersigned hereby (1) acknowledges receipt of a copy of the 1982 *United States v. Western Electric* Modification of Final Judgment and a written directive setting

forth Company policy regarding compliance with the antitrust laws and with such Modification of Final Judgment, (2) represents that the undersigned has read such Modification of Final Judgment and directive and understands those provisions for which the undersigned has responsibility, (3) acknowledges that the undersigned has been advised and understands that non-compliance with such policy and Modification of Final Judgment will result in appropriate disciplinary measures determined by the Company and which may include dismissal, and (4) acknowledges that the undersigned has been advised and understands that non-compliance with the Modification of Final Judgment may also result in conviction for contempt of court and imprisonment and/or fine.

VI

Visitorial Provisions

A. For the purpose of determining or securing compliance with this Modification of Final Judgment, and subject to any legally recognized privilege, from time to time:

1. Upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to a defendant or after the reorganization specified in section I, a BOC, made to its principal office, duly authorized representatives of the Department of Justice shall be permitted access during office hours of such defendants or BOCs to depose or interview officers, em-

ployees, or agents, and inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, BOC, or subsidiary companies, who may have counsel present, relating to any matters contained in this Modification of Final Judgment; and

2. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to a defendant's principal office or, after the reorganization specified in section I, a BOC, such defendant, or BOC, shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Modification of Final Judgment as may be requested.

B. No information or documents obtained by the means provided in this section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States or the Federal Communications Commission, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

C. If at the time information or documents are furnished by a defendant to plaintiff, such defendant or BOC represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant or BOC marks each pertinent

page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days' notice shall be given by plaintiff to such defendant or BOC prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which that defendant or BOC is not a party.

VII

Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

VIII

Modifications

A. Notwithstanding the provisions of section II(D)(2), the separated BOCs shall be permitted to provide, but not manufacture, customer premises equipment.

B. Notwithstanding the provisions of section II(D)(3), the separated BOCs shall be permitted to produce, publish, and distribute printed directories which contain advertisements and which list general product and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses.

Notwithstanding the provisions of sections I(A)(1), I(A)(2), I(A)(4), all facilities, personnel, systems, and rights to technical information owned by AT & T, its affiliates, or the BOCs which are necessary for the production, publication, and distribution of printed advertising directories shall be transferred to the separated BOCs.

C. The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

D. AT & T shall not engage in electronic publishing over its own transmission facilities. "Electronic publishing" means the provision of any information which AT & T or its affiliates has, or has caused to be, originated, authored, compiled, collected, or edited, or in which it has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means.

Nothing in this provision precludes AT & T from offering electronic directory services that list general product and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses; or from providing the time, weather, and such other audio services as are being offered as of the date of the entry of the decree to the geographic areas of the country receiving those services as of that date.

Upon application of AT & T, this restriction shall be removed after seven years from the date of entry of the decree, unless the Court finds that competitive conditions clearly require its extension.

E. If a separated BOC provides billing services to AT & T pursuant to Appendix B(C)(2), it shall include upon the portion of the bill devoted to interexchange services the following legend:

> This portion of your bill is provided as a service to AT & T. There is no connection between this company and AT & T. You may choose another company for your long distance telephone calls while still receiving your local telephone service from this company.

F. Notwithstanding the provisions of Appendix B(C)(3), whenever, as permitted by the decree, a separated BOC fails to offer exchange access to an interexchange carrier that is equal in type and quality to that provided for the interexchange traffic of AT & T, the tariffs filed for such less-than-equal access shall reflect the lesser cost, if any, of such access as compared to the exchange access provided AT & T.

G. Facilities and other assets which serve both AT & T and one or more BOCs shall be transferred to the separated BOCs if the use made by such BOC or BOCs predominates over that of AT & T. Upon application by a party or a BOC, the Court may grant an exception to this requirement.

H. At the time of the transfer of ownership provided for in section I(A)(4), the separated BOCs shall have debt ratios of approximately forty-five percent (except for Pacific Telephone and Telegraph Company which shall have a debt ratio of approximately fifty percent), and the quality of the debt shall be representative of the average terms and conditions of the consolidated debt held by AT & T, its affiliates and the BOCs at that time. Upon applica-

tion by a party or a BOC, the Court may grant an exception to this requirement.

I. The Court may act *sua sponte* to issue orders or directions for the construction or carrying out of this decree, for the enforcement of compliance therewith, and for the punishment of any violation thereof.

J. Notwithstanding the provisions of section I(A), the plan of reorganization shall not be implemented until approved by the Court as being consistent with the provisions and principles of the decree.

(2)

No. 92-848

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERITECH CORPORATION, *et. al.*,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et. al.*,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF UNITED STATES TELEPHONE ASSOCIATION (A RESPONDENT UNDER RULE 12.4) IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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December 7, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The United States Telephone Association concurs in the list of parties contained in the Petition of Ameritech Corporation, *et. al.*

The United States Telephone Association is the principal trade association of local telephone companies. All of the regional Bell Operating Companies are members of USTA, as are more than 1,000 other local telephone companies, sometimes called independent telephone companies. The independent telephone companies together serve about 59% of the land area of the United States, but only about 18% of the population.

USTA has no parent or subsidiaries, and has no securities in the hands of the public. It is a not-for-profit corporation which is incorporated in Illinois, and has existed since 1897.

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STATEMENT OF THE CASE

The United States Telephone Association generally concurs in petitioners' statement of the case.

The Association and its members have a direct, vital interest in a technologically advanced telephone network and, hence, the rapid deployment of common control signalling (or CCS) technology. Congress likewise has legislatively declared it "shall be the *policy of the United States*" to encourage "the provision of new technologies and services to the public." 47 U.S.C. § 157(a). Moreover, Congress decreed that "[a]ny person . . . who opposes a new [communications] technology or service . . . shall have the burden to demonstrate that such [technology or service] is inconsistent with the public interest." 47 U.S.C. § 157(a)

The decision below turns that policy on its head; it completely reverses the evidentiary burden of proof established by Congress. Where, as here, the Bell Operating Companies' introduction and development of network technologies is inhibited, the adverse impact reverberates upon every telephone company, no matter how small. The network efficiencies introduced in the Bell Operating Company networks directly affect the efficiencies available in the non-sell independent telephone company networks. Consequently, the lower court's decision adversely affects many nonparties to the decree, including independent telephone companies and their millions of customers.

The decision below resulted from a motion filed by U S West (one of the seven Bell Regional Holding Companies created by the AT&T divestiture decree). U S West sought a declaratory ruling or alternatively, a waiver, so that its telephone operating companies

would not have to install signalling interfaces in each of the 27 LATAs in its region. (CA JA 441). U S West was not seeking to provide inter-LATA calls to customers (which is forbidden by the decree); rather U S west was seeking the most efficient engineering option to "set up" calls which are originated and terminated by a long distance company. Specifically, technological advances made it possible to process the call control signal separately from the call itself.[1] Processing signals on a volume basis would make introduction of such technology efficient and cost effective. U S West sought authority to install those signalling interfaces in six large LATAs, stating that "from a purely engineering standpoint, U S West requires a CCS interface in only six of its LATAs." (CA JA 455).

Had the declaratory ruling or waiver been granted (which it was not), U S West would not be required to purchase and install 46 additional processors to provide the required signalling in every LATA. (CA JA 455). U S West documented that its proposal to aggregate signalling would reduce costs, promote efficient facility use, and provide an additional incentive for small long distance carriers to expand their service in competition with established national carriers like AT&T. (CA JA 455-458).

The common channel signalling matter immediately at issue is merely illustrative of the significant prob-

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[1] Common channel signalling establishes that a call path is available, and forwards key call-related information that assists other carriers to process the call correctly. It represents the application of a CCITT (worldwide) transmission convention in the United States. See Petition at 4-5.

lems the divestiture decree restrictions create for independent telephone companies. Most local telephone companies are small, locally owned and with limited service areas (often small rural areas). The decree's unique contours drastically limit the Bell Operating Companies' ability to provide specific types of signalling for small independent telephone companies even *within* a LATA if that signalling must leave the LATA for processing and then return over the network of a Bell Operating Company. In this situation, the decree is even more restrictive for independent telephone companies than for the Bell Operating Companies themselves. (*See* Order, February 10, 1992, U.S. District Court for the District of Columbia in the ongoing decree administration context.) In short, if small independent telephone companies seek to participate in a transmission scheme based on CCS, even to offer only exchange and exchange access services, the decree restricts many to alternative choices that are less efficient and more costly.

To a very real extent, the independent telephone companies' ability to use resources efficiently depends in turn on the efficient development of signalling and related capabilities by the Bell Operating Companies. The independent telephone companies' typically-less-efficient alternative is to develop arrangements with others who are not subject to the decree's restrictions, such as other carriers, including AT&T. Some have taken steps in this regard, but networking realities limit the options. A number of carriers have concluded that the other options are entirely unavailable to them, or if technically feasible, are too costly. As a result of the decree limitations, then, handling specific types of signalling becomes more difficult than

handling the related call. If an independent telephone company continued to seek out signalling arrangements with a Bell Operating Company, the independent company's signalling "queries" may be forced into a circuitous path born not of engineering efficiency but decree compliance.

The independent telephone companies face still another problem as advances in signalling technology continue to become available. Typically, the district court has addressed signalling issues by fielding waiver requests. Consequently, if new CCS applications are created, additional waiver requests to address the networking requirements of independent telephone companies will become necessary. Since no independent telephone company was an original party to the decree, an independent cannot ask for relief itself directly from the district court. Thus, each small independent telephone company can face a legal and practical hurdle steeper than that faced by the decree's original parties.

REASONS FOR GRANTING THE PETITION

In the ten years since the decree was entered, communications technology, competition and regulation have undergone profound changes. Those changes have combined with the decree limitations on the Bell Operating Companies to undermine the public interest rather than to serve the goals of the decree and the antitrust laws. They inhibit competition and thwart the efficient provision of communications services. This case illustrates the growing problems of giving AT&T, one of the original parties to the decree, a virtual veto power over the introduction of technologies in the networks of other carriers. Not only is sustaining that veto power anticompetitive (Petitioners

Br. at 22), it violates the "policy of the United States" in that it frustrates the introduction of new technology.

Ironically, the decree today imposes virtually no restrictions on AT&T, the primary defendant in the antitrust case resulting in the decree. Indeed, while the core purpose of the decree was to divest AT&T's long distance services from the Bell Operating Companies' exchange services, AT&T is now reentering the exchange access market through, among other things, targeted large customer offerings and the purchase of a substantial ownership interest in the country's largest cellular telephone company. (*See* Petition at 14.)

While AT&T can compete against local telephone companies in an increasing array of exchange services, the decree still precludes the Bell Operating Companies from competing against AT&T. In addition to this competitive asymmetry, the decisions below have bestowed a special status on AT&T the competitor, i.e., veto privileges over proposed decree modifications, including technology deployment in the networks of the Bell Operating Companies, even those the Department of Justice finds will serve the public interest and that may help AT&T's smaller competitors. That is precisely what happened here, and will recur if the lower court's decision is allowed to stand. In this case, the Department of Justice recommended relief because it would enhance the efficient provision of services, would be pro-competitive and would benefit the public generally. (CA JA 672, 689-690.)

Nevertheless, the district court denied the waiver request and the appeals court affirmed, over dissent. The appeals court pointed out that "The proposition

that AT&T's position on a proposed line of business modification can be determinative of whether the section VIII(c) first applies has . . . been a linchpin in two of our decisions." (Petition, Appendix A at 24a.) The court then simply chose not to permit the Bell Operating Companies to raise in this case the challenge to AT&T's effective veto of any relief it opposed. (Id.)

In the appeal, the United States cautioned against an interpretation of the decree that would motivate AT&T to oppose pro-competitive decree modifications to protect itself from the very competition such modifications could promote. (*See* Petition, Appendix A at 21a.) The dissent recognizes that AT&T's "contest" to a decree modification, in the form of opposition to a motion for relief, gives an original defendant—with no institutional interest in promoting competition in markets in which it competes—the unique ability to displace the otherwise applicable standard, even over the objection of the United States. (Petition, Appendix A at 31a.) Thus, restraints that can be justified only to the extent they enhance competition are enforced as an anticompetition agreement by a "private party that (naturally) resists intrusion on its turf." (Id.)

The incentive exists for AT&T to exercise its new veto whenever its private self-interest merits it. Indeed, in every antitrust consent decree requiring divestiture, the desire of one of the successor businesses to begin to compete against another will trigger the issues raised here, if the standard of this case prevails there. And the problem will become significantly greater if more parties are initially involved in a particular divestiture case.

A central issue in today's telecommunications environment that affects both the Bell Operating Companies and the independent telephone companies exists because restraints originally designed to promote competition now, due to intervening changes, have the opposite impact. The restraints lose their meaning in markets where competition is established and other competitors operate without restraints. Those restraints continue to be exploited by competitors for anticompetitive ends. In the telecommunications business in particular, time and events have dramatically altered the landscape, reversing the impact of decree limits on the fundamental network operations implicated here, and promoting anticompetitive ends instead.

This case provides an opportunity to address directly a core antitrust concern that has occurred more often in recent years in the review of antitrust consent decrees—maintaining the procompetitive policies of the antitrust laws by providing clear support for the public interest assessment of the public's representative, the Department of Justice. In short, the issue posed by the Petition, while well-illustrated by this particular waiver request, is likely to recur in other circumstances in the future.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Nos. 92-848 and 92-879

In the Supreme Court of the United States

OCTOBER TERM, 1992

AMERITECH CORPORATION, ET AL., PETITIONERS

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.

BELLSOUTH CORPORATION

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the standard set out in Section VIII(C) of the *AT&T* consent decree governs motions for modification of the line-of-business restrictions imposed on the Bell Operating Companies (BOCs) by the consent decree, where the motion for modification was made by the BOCs and is supported by the United States, but is opposed by AT&T.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-848

AMERITECH CORPORATION, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (92-848 Pet. App. 1a-41a) is reported at 969 F.2d 1231.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1992. On October 14, 1992, the Chief Justice

extended the time for filing a petition for a writ of certiorari to and including November 20, 1992. The petition in No. 92-848 was filed on November 16, 1992, and the petition in No. 92-879 was filed on November 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The 1982 consent decree entered in the government's antitrust case against AT&T (which is sometimes referred to as the "MFJ," for "modification of final judgment")[1] required divestiture of the Bell Operating Companies (BOCs) from AT&T. It also imposed "line-of-business" restrictions and other obligations on the divested BOCs. The line-of-business restrictions generally prohibited the BOCs from engaging in businesses other than local exchange telephone service. The BOCs were specifically prohibited from providing "interexchange telecommunications services" (which includes "long distance" service) and from providing "information services" (such as LEXIS). The BOCs were also specifically prohibited from manufacturing or providing certain types of equipment. 552 F. Supp. 131, 227-228, 231 (D.D.C. 1982). In 1987, the district court removed the restriction on nontelecommunications businesses and modified the information services restriction. In 1991, following a remand by the District of Columbia Circuit, it removed the information services restriction altogether. The bar

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[1] *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

to providing interexchange services and the equipment restrictions remain in effect.

The decree provision barring the BOCs from providing "interexchange telecommunications services" not only covers traditional "long distance" services, such as AT&T and MCI provide, but also prohibits the BOCs from providing any "telecommunications services" that cross the boundaries between the "exchange areas" or "LATAs" defined pursuant to the decree.[2] In order to complete interexchange calls, therefore, both the communication between the parties and the associated "network control signaling"[3] must be switched between BOC networks and interexchange carrier networks. An "in-band" telecommunications system uses the same

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[2] See MFJ § II(D)(1), 552 F. Supp. at 227; MFJ § IV(K), 552 F. Supp. at 229; MFJ § IV(G), 552 F. Supp. at 229. Because the term "exchange area" has a variety of meanings in the telecommunications industry, the term "LATA" (local access and transport area) was used to refer to the exchange areas established pursuant to the decree. See *United States* v. *Western Elec. Co.*, 569 F. Supp. 990, 993-994 n.9 (D.D.C. 1983). Each BOC provides local telephone service in a region comprised of multiple LATAs, but a BOC may not provide interexchange telecommunications services even within the region it serves.

[3] "Network control signaling" controls the operation of telephone network switches to set up, maintain, and disconnect the circuit used for a call; it also provides billing information for carriers. Network control signaling indicates, for example, the initiation of a call, the calling number, the number dialed, whether the phone is ringing or "busy" at the called station, the completion of the connection to the called station, and the disconnection when the parties hang up. 92-879 Pet. App. 6a, 49a.

facilities (lines and switches) to transmit both the communications and the network control signaling. 92-848 Pet. App. 6a. In contrast, a more efficient common channel signaling ("CCS") system transmits network control signaling over a data network separate from the communications channel.[4] Therefore, with a CCS system it is not necessary to transfer network control signaling between BOCs and interexchange carriers at the same locations where the communications themselves are transferred, as it is with an in-band system.

Several years ago, the BOCs began to deploy "SS7-CCS," a specific CCS protocol, within their networks and to use it for a variety of functions. Most interexchange carriers also are deploying SS7 in their networks or plan to do so in the near future. 92-848 Pet. App. 8a, 47a & n.6. A CCS system can be used to some extent within a BOC's network or an interexchange carrier's network even if only in-band signaling is transmitted from one to the other. In order to obtain the full benefits of CCS for interexchange calls, however, the BOCs and the interexchange carriers must interconnect their CCS networks. Interconnection between a BOC's CCS network and an interexchange carrier's CCS network requires that the BOC and the interexchange carrier each have special CCS switches, called "Signaling

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[4] Some of the advantages of CCS over in-band signaling are that CCS permits faster set-up of calling circuits and transmits more network control information. 92-879 Pet. App. 7a.

Transfer Points" (STPs).[5] In planning for CCS, the BOCs determined that the cost to them and to the interexchange carriers of implementing CCS could be minimized if, instead of having the BOCs and interexchange carriers install STPs in every LATA, the BOCs and the interexchange carriers interconnected their CCS networks using fewer STPs. To do this, the BOCs proposed to carry CCS network control signaling across some LATA boundaries before delivering it to interexchange carriers.[6] 92-848 Pet. App. 12a-13a n.11.

2. In industry CCS planning meetings, AT&T asserted that the BOCs would violate the decree by transporting CCS signaling across LATA boundaries; that is, AT&T argued that the BOCs would engage in prohibited interexchange service by doing so. The BOCs disagreed. C.A. App. 450. Therefore, U S West, later joined by the other BOCs, moved in the district court under Section VII of the decree[7] for a declaratory ruling that the decree does not require the BOCs to install a CCS interface in each LATA. In the alternative, the BOCs moved under Sections

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[5] STPs are deployed in pairs to improve network reliability. If there is a problem with one of the pair, traffic can be routed automatically to the other. 92-848 Pet. App. 7a n.5.

[6] Under their proposal, the BOCs would continue to deliver end user communications associated with CCS signaling to interexchange carriers within the originating LATAs.

[7] Section VII permits "any of the parties to [the decree] or, after [divestiture], a BOC to apply to [the district c]ourt at any time for * * * orders * * * for the construction or * * * modification of any of the provisions [of the decree]." 552 F. Supp. at 231.

VII and VIII(C) of the decree[8] for a waiver, *i.e.*, a modification of the decree, to permit them to use centralized STPs for transferring CCS network control signaling between BOCs and interexchange carriers.[9]

The United States took the position that the decree required the BOCs to deliver network control signaling to the interexchange carrier in the LATA where a call originates and, thus, that the BOCs would need a waiver.[10] The United States further concluded that such a waiver should be granted because it would serve the public interest in competition. That conclusion was based in part on the

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[8] Section VIII(C) requires the court to remove a Section II(D) line-of-business restriction "upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." 552 F. Supp. at 231.

[9] The interexchange carriers that filed responses in the district court opposed the declaratory ruling. Three interexchange carriers, AT&T, MCI, and ALC, also opposed the requested waiver. Three smaller interexchange carriers, MidAmerican, Teleconnect, and US Sprint, along with CompTel, an association of interexchange carriers, urged the court to grant a waiver, but proposed additional conditions. The interexchange carriers supporting a waiver argued that it would expedite the deployment of SS7 and that implementation of CCS interconnection in every LATA would be too costly for the smaller interexchange carriers.

[10] Unlike AT&T, the United States did not contend that BOCs transport of network control signaling across LATAs for delivery to interexchange carriers would be "interexchange telecommunications service." But the government contended that it would involve "exchange access service" and that Section IV(F) of the decree required exchange access service to be provided in the originating LATA.

failure of the interexchange carriers opposing the motions to identify any anticompetitive effect that would be likely to result from centralized CCS access service. Moreover, centralized CCS interconnection would be less costly to BOCs and to interexchange carriers than establishing STP pairs in all LATAs and thus would facilitate the deployment of CCS.

3. While the CCS waiver motions were pending in the district court, the D.C. Circuit decided the "Triennial Review" appeals. *United States* v. *Western Elec. Co.*, 900 F.2d 283 (D.C. Cir.), cert. denied, 111 S. Ct. 283 (1990). The court of appeals affirmed the district court's denial of the BOCs' motions for removal of the decree's interexchange services and equipment manufacturing restrictions. The court of appeals also held that because the United States supported and AT&T did not oppose the BOCs' motions for removal of the information services restriction, neither the special standard of Section VIII(C) nor the stringent "unforeseen conditions" standard articulated in *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932), applied to those motions. Rather, the court of appeals held, the common law "public interest" standard incorporated in Section VII of the decree applied. 900 F.2d at 305-307. Under that standard, the district court was to approve the proposed modification if it was "within the *reaches* of the public interest," *id.* at 309 (citations and internal quotation omitted), *i.e.*, unless it "would be certain to lessen competition," *id.* at 308.[11]

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[11] The court of appeals remanded the information services motions for reconsideration under the public interest standard, and the district court granted those motions, removing the

Because the BOCs sought removal of the equipment manufacturing restrictions—relief which the United States supported and AT&T opposed—solely under Section VIII(C), the court of appeals did not determine what standard would have applied to motions for such relief under Section VII. In a footnote to its holding that the United States may move for decree modifications only under Section VII, however, the court of appeals commented:

> The Government *opposed* the modification sought in *Swift*, and therefore it is not at all clear to us that the stringent, so-called "unforeseen conditions" test of *Swift* would apply to motions brought by the *DOJ* under section VII. Since the DOJ is, as plaintiff, the "Prime Mover" of this case, it may well be that modifications it seeks should be evaluated under a standard somewhat more akin to the "public interest" test of the Tunney Act. Still, it is true that the line of business restrictions were part of what AT&T bargained for in the original decree, therefore suggesting that the modification requests that AT&T opposes should perhaps be viewed differently from those that all the parties agree to. We need not pass judgment on this issue here since the DOJ brought no motion under section VII.

900 F.2d at 294-295 n.12.

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information services restriction altogether. *United States* v. *Western Elec. Co.*, 767 F. Supp. 308 (D.D.C. 1991). Appeals from that decision are pending in the D.C. Circuit, *United States* v. *Western Elec. Co.*, No. 91-5263 (argued Dec. 1, 1992).

4. After the court of appeals rendered its Triennial Review Decision, the district court denied the BOCs' motions in this case. 92-848 Pet. App. 44a-53a, 54a-56a. The district court first held that "section IV(F) of the decree requires that network control signals be delivered within the originating LATA" and that "the transport of signaling messages over LATA boundaries is an interexchange function." *Id.* at 54a.

The district court also denied the BOCs' alternative request for a waiver. It declined to apply the common law public interest standard applicable to uncontested decree modifications, although the government supported the BOCs' motions, because AT&T opposed them. 92-848 Pet. App. 55a n.1. In denying the waiver under the Section VIII(C) standard, the district court did not identify any specific competitive risk posed by the BOCs' proposal. It viewed the proposal, however, as a step in "a piecemeal dismantling of [the interexchange] restriction," *id.* at 55a, and concluded that the Department of Justice "ha[d] not furnished economic evidence or predictions of market behavior adequate to persuade either [the district c]ourt or the Court of Appeals that entry of the Regional Companies into the interexchange market is now justified." *Ibid.*

5. The BOCs appealed, and the United States, as appellee, also urged reversal. The government contended that the public interest standard—that is, the standard that usually applies where the government and an antitrust defendant that is subject to a restriction imposed by a consent decree agree on a modification—should apply to BOC motions for modification of the MFJ line-of-business restrictions

to which the United States consents, since only the BOCs are restrained by those restrictions.[12]

a. A divided panel of the D.C. Circuit affirmed. 92-848 Pet. App. 1a-41a. The majority (Judge Silberman, joined by Judge Sentelle) held that "the CCS waiver must be judged according to section VIII(C)'s standard, for whenever a modification implicates the line-of-business restrictions and is contested by *any* of the parties to the decree, the section VIII(C) test governs." *Id.* at 23a.[13] The majority observed that the line-of-business restrictions were intended to prevent the BOCs' "return" to the interexchange market "with the same sort of local monopoly leverage that caused the government to bring suit against AT&T in the first place." *Id.* at 17a. Thus, it rejected the argument "that AT&T has no interest under the decree" in the line-of-business restrictions. *Id.* at 16a. In the majority's view, "[t]he decree is not ambiguous; it gives AT&T the right, as a party to the decree, to assert its objection to the BOCs' proposal and thus to invoke section VIII(C)." *Id.* at 22a. The majority added that "[u]ntil this case, the government has never even suggested that the decree could be

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[12] The BOCs also argued that the district court had erred in concluding that their proposal did not satisfy the Section VIII(C) standard. The United States did not raise that issue on appeal.

[13] The court of appeals upheld the district court's conclusion, which the parties had not challenged on appeal, that the proposed decree modification requires a waiver of a line-of-business restriction. 92-848 Pet. App. 12a-13a.

read otherwise." *Id.* at 22a-23a; see also *id.* at 15a, 22a, 24a.[14]

The majority also affirmed the denial of the BOC motions "on this record" under Section VIII(C), viewing the BOCs' proposal as a request "to take a piece of the interexchange market completely out of competition." 92-848 Pet. App. 24a-29a.

b. Judge Williams dissented. The majority's interpretation of the decree, he emphasized, allows the Section II(D) line-of-business restrictions to operate as "a market-allocation agreement between the separate firms into which the Bell System was split" by the decree, 92-848 Pet. App. 30a, "*i.e.*, a *per se* violation of the Sherman Act." *Id.* at 34a. Judge Williams pointed out that AT&T's opposition to removal of the line-of-business restrictions is "at least as easily chalked up to fear of enhanced competition as to any genuine concern for its reduction." *Id.* at 39a. No antitrust injury to AT&T can flow from entry itself; thus, "[t]o read the decree as assigning AT&T special rights against modifications of the line-of-business rules is to allow it just the sort of preemptive strike against competition that the [Supreme] Court rejected in [*Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986).]" 92-848 Pet. App. 39a.

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[14] The court found further support for its conclusion in prior D.C. Circuit decisions treating motions supported by the United States and opposed by AT&T as "contested," although it recognized that these decisions "cannot be said to have *held* that AT&T's opposition makes a requested modification contested—because the point was not directly controverted." 92-848 Pet. App. 22a-24a.

The court, Judge Williams said, "should be slow to give the section [II(D)] a role in such obvious tension with the purposes of the antitrust laws." 92-848 Pet. App. 34a. Moreover, he added, the majority's anticompetitive holding was not supported by the language or history of the decree or by general equitable principles. *Ibid.* In his view, neither Section VII nor Section III addresses the question whether Section VIII(C) or the public interest standard applies to line-of-business modifications that AT&T opposes. *Id.* at 31a-33a. Under general principles of contract law, "each obligation runs only to those whom it was intended directly to benefit"; it "will not run automatically to every party that might incidentally derive a benefit." *Id.* at 37a. Moreover, Judge Williams added, the parties' contemporaneous statements did not support the majority's view that AT&T had a protected interest in the line-of-business restrictions. To the contrary, they indicated "that Bell was at least ambivalent and probably hostile to the [line-of-business] restrictions." *Id.* at 38a. Accordingly, Judge Williams concluded that the case should be remanded to the district court for application of the public interest standard. *Id.* at 41a.

Judge Williams did not address the majority's holding that the proposed modification did not satisfy the Section VIII(C) standard. He explained, however, that the BOCs did not seek to expand their monopolies into the competitive interexchange market as the majority believed. Rather, they "propose only to change the *means* of implementing the monopolies granted to them by state law." 92-848 Pet. App. 40a.

ARGUMENT

The court of appeals erred by holding that AT&T's objection required that the BOCs' motions for modification of the line-of-business restrictions be reviewed under Section VIII(C) of the decree. In our view, such motions should be reviewed under the public interest standard of Section VII if the government consents to a modification. However, we are not persuaded that this case warrants this Court's review. Because it involves the interpretation of a particular antitrust decree, there is no conflict among the circuits. In addition, the decision below may have limited significance because this case does not involve a motion by the United States to modify a decree restriction, and the lower courts might not apply Section VIII(C), which speaks of a "petitioning BOC," when the government petitions for modification. Moreover, there is no pressing need at this time for review of the question presented.

1. In our view, the court of appeals erred by holding that Section VIII(C) of the decree, rather than the public interest standard, governs BOC motions to modify line-of-business restrictions that are supported by the government, if AT&T objects. Under established law, as the court of appeals has recognized, defendants' uncontested motions to modify antitrust decree restrictions must be approved if they fall "within the reaches of the public interest." See 900 F.2d at 305-309; *United States* v. *Bechtel Corp.*, 648 F.2d 660 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). The public interest standard, as the court of appeals also recognized, must be deemed to have been incorporated in Section VII of the decree,

United States v. *Western Elec. Co.*, 900 F.2d at 305-307, for courts presume that the parties "intended to adopt 'the ordinary substantive * * * standards that attend decree modification[s],' " *id.* at 307 (quoting *United States* v. *Western Electric Co.*, 894 F.2d 430, 436 (D.C. Cir. 1990)).

The court of appeals nevertheless ruled that the BOCs' motions—which the government supported—were governed by the specialized standard of Section VIII(C) of the decree. But Section VIII(C) was added to the decree prior to its entry at the behest of the district court to deal with BOC motions that were opposed by the government. Having ruled, over the government's objection, that the BOCs should be allowed to provide certain services in competitive markets, the district court wished to ensure that similar BOC requests in the future would not be subjected to the stringent standard of *United States* v. *Swift*, *supra*. *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. at 195 n.266. The *Swift* standard, which generally governs a defendant's motion to modify an antitrust decree over the government's opposition, requires the defendant to make a "clear showing of grievous wrong evoked by new and unforeseen conditions." 286 U.S. at 119. To avoid application of that standard, which would make it extremely difficult to remove a restriction over the government's objection, the district court required the parties to add Section VIII(C), which sets out a standard that is demanding, but not as difficult to satisfy as the *Swift* standard: it provides that the line-of-business restrictions "shall be removed upon a showing by the petitioning BOC that there is no

substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." 552 F. Supp. at 231.

The court of appeals' conclusion that Section VIII(C) controls here, even though the government consents to the modification sought by the BOCs, stems from an unusual aspect of this case: the defendant that agreed to the line-of-business restrictions subsequently split into eight successor firms, whose present interests do not coincide on this point. The BOCs, and not post-divestiture AT&T, are properly viewed as the successors to the Bell System with respect to the line-of-business restrictions. Only the BOCs are bound by those restrictions; post-divestiture AT&T is not so bound and, indeed, competes in markets from which the decree bars the BOCs. Thus, the BOCs—and not AT&T—stand in the position of the antitrust defendant for purposes of determining whether a modification of the restrictions applicable to them is consensual.

The decree's history does not support the court of appeals' conclusion that the parties intended to depart from the usual principles governing modification of consent decrees and to give the opposition of a private defendant not subject to the decree restrictions the same weight as opposition by the government plaintiff. The United States originally sought the line-of-business restrictions and the court approved them to protect competition from possible BOC abuses of monopoly power in the local exchange markets. As Judge Williams stated, the defendant Bell System "was at least ambivalent and probably hostile to the restrictions." 92-848 Pet. App. 38a; see

also 552 F. Supp. at 186 n.227 ("the Department is the principal proponent of the restrictions on the Operating Companies. AT&T has generally taken the stance that it agreed to these restrictions as part of the overall settlement"). There is no evidence that the government or the pre-divestiture Bell System (which included the BOCs) desired to afford post-divestiture AT&T special rights to oppose modification of restrictions that did not apply to it, much less evidence that there was a meeting of the minds on the point.[15]

Post-divestiture AT&T, of course, has an economic interest in maintaining the restrictions imposed on the BOCs to minimize the risk that the BOCs might use their local monopolies to impede competition in other markets. In that respect, however, AT&T stands in the same position as other interexchange carriers. Furthermore, AT&T and the other competitors in markets from which the BOCs are barred may benefit from the anticompetitive effects of continuing restrictions on BOC entry that no longer serve the public interest in competition. So in this case, AT&T and MCI, the largest long distance companies, opposed the waiver request, while smaller long distance companies that could have benefited from the BOCs' proposal supported the waiver request. In short, although the district court has

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[15] The court of appeals noted that "section III [of the decree] treats AT&T as a formal party to the *entire* decree, with specific authority under section VII to demand enforcement of *any* section of the agreement." 92-848 Pet. App. 18a. Section III, however, says nothing about the standard governing decree modifications. See *id.* at 32a-33a.

properly allowed interested persons to express their views on proposed decree modifications, it is the United States that represents the public interest in competition in government antitrust proceedings, see *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961); *United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113, 116-117 (8th Cir.), cert. denied, 429 U.S. 940 (1976), subject to judicial review under the public interest standard.

2. Despite our disagreement with the court of appeals' conclusion, we do not urge the Court to grant the petition. The court of appeals' holding was based squarely on its interpretation of the terms of the MFJ. See 92-848 Pet. App. 18a ("section III treats AT&T as a formal party to the *entire* decree, with specific authority under section VII to demand enforcement of *any* section of the agreement"). Accordingly, it establishes no clear precedent for other multiparty decrees. Moreover, the problem in this case results from the unusual fact that the original defendant was split into eight successor firms, seven of which are bound by the line-of-business restrictions and one of which is not. Petitioners have cited no other case in which a successor of a defendant that is not restricted by the terms of a consent decree objected to the lifting of a restriction placed on another successor, and we are aware of no such case. Thus, this case presents no conflict with the law of any other circuit and no legal question of general applicability. Nor does the case present an important constitutional issue.

Moreover, the scope of the court of appeals' ruling is unclear. The court of appeals limited its holding to

modifications of the decree's line-of-business restrictions, expressly declining to decide what standard would apply to modifications of other provisions. See 92-848 Pet. App. 23a n.17. Moreover, this case did not involve a motion by the United States to modify the decree. The court of appeals held in the Triennial Review decision that Section VIII(C) applies only to BOC motions, as the language referring to a "petitioning BOC" states; the United States may move for decree modifications only under Section VII. 900 F.2d at 294. Although we believe that the public interest standard should apply whether the United States supports a BOC motion or files its own motion, the decision below did not decide what standard applies to government motions. See *Id.* at 294 & n.12; 92-848 Pet. App. 9a-11a. If the court of appeals were to hold the public interest standard applicable where the United States moves under Section VII for a line-of-business modification (sought or consented to by the BOCs)—as we submit it should—the holding below would not significantly impede the govern-ment's ability to carry out its responsibility to ensure that the decree serves the public interest in competition.

Moreover, while there is no doubt that the decree at issue significantly affects competition and innovation in telecommunications and related industries, and while unnecessary restrictions on vertical integration and entry into important and technologically critical markets may undercut the public interest in competition, the direct effect of the judgment in this case is relatively limited, as a practical matter. That is, an issue warranting review by this Court might be presented if, for example, the government moved for

modification of the equipment manufacturing restrictions, and AT&T were able to block the modification under Section VIII(C).[16] The question of what standard applies when the government seeks to modify a line-of-business restriction would then be presented, and in a context where competition in an important market might well be affected. But the issue directly affected by the judgment in this case is whether the BOCs may carry network control signals across LATA boundaries, a technical issue of limited practical importance in comparison with the other issues that may arise under the decree. Moreover, while this case has been pending, the BOCs

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[16] Although both the public interest standard and the Section VIII(C) standard focus on competition, they differ significantly. Under the public interest standard the Department of Justice is required to present its competitive analysis to the court, interested persons may comment, and the Department responds. The court then reviews the record to ensure that the Department has not breached its duty to the public in consenting to the modification. But the court's review is limited, and it must approve all modifications that fall within the "reaches of the public interest," 900 F.2d at 307-309; see also *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); *United States* v. *Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975). By contrast, under Section VIII(C), the BOCs have the burden of proving a negative—that "there is no substantial possibility that [the BOC] could use its monopoly power [in local exchange service] to impede competition in the market it seeks to enter." 900 F.2d at 295. The district court conducts a de novo inquiry and the court of appeals may reverse a refusal to modify the decree only if the district court's findings are clearly erroneous or based on legal error. See *id.* at 293-294. Thus, whether Section VIII(C) applies may be determinative.

have installed STPs in nearly all of the LATAs, so a decision by this Court would have very little practical impact on the dispute that gave rise to the case. Accordingly, while review of the question presented might be warranted in some future case, it is not warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 92-848, 92-879

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERITECH CORPORATION, *et al.*,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Respondents.

BELLSOUTH CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Respondents.

Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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AT&T'S BRIEF IN OPPOSITION

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QUESTION RESTATED

Whether the D.C. Circuit correctly held that AT&T has rights to enforce certain provisions of the 1982 AT&T Antitrust Consent Decree and that these provisions cannot be modified, over AT&T's objection, unless the seven divested Bell Companies satisfy the agreed-upon modification standard set forth in Section VIII(C) of this Decree.

STATEMENT REQUIRED BY RULE 29.1

American Telephone and Telegraph Company ("AT&T") has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in the following companies that have publicly-traded securities: Compagnie Industriali Riunite S.P.A., AT&T Capital Corporation, and AT&T Credit Corporation.

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Nos. 92-848, 92-879

AMERITECH CORPORATION, *et al.*

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*

BELLSOUTH CORPORATION

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*

AT&T'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

These petitions present a narrow issue involving the interpretation of the 1982 Antitrust Consent Decree that broke up the former Bell System ("Decree").[1] The D.C. Circuit held that this Decree gives the post-divestiture AT&T a right to enforce certain provisions of the Decree in accordance with its terms and original purposes and that these provisions thus cannot be modified, over AT&T's objection, unless the divested Regional Bell Operating Companies ("RBOCs") have satisfied the modification standard set forth in Section VIII(C) of the Decree. The

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[1] *See United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982) ("*Decree Opinion*"), *aff'd mem. sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). The petition of Ameritech *et al.* (No. 92-848) will be cited as "Pet." and the petition of BellSouth (No. 92-879) will be cited as "BellSouth Pet."

D.C. Circuit held that this interpretation was required by the unambiguous terms of this Decree, by the circumstances surrounding its adoption, and by the prior interpretations, positions, and practices of the Justice Department, the RBOCs, and the courts alike during the first eight years after the Decree's entry.

This decision is an application of settled principles of consent decree construction to a set of unique facts. The D.C. Circuit decision does not conflict with the decision of any other court. Indeed, the only way petitioners can challenge the D.C. Circuit's decision is by ignoring controlling principles and by asserting a series of factual claims that the lower courts correctly rejected and that are otherwise inappropriate for review by this Court. Beyond that, intervening events establish that the disputed issue has no practical importance for the administration of this, or any other, decree.

1. The AT&T Decree. The AT&T Antitrust Decree was entered in 1982 to put an end to three decades of incessant antitrust litigation between the former Bell System and the United States (and more than 70 private plaintiffs). In that litigation, the United States (and the private plaintiffs) claimed that the Bell System's combination of regulated local exchange "bottleneck" monopolies and potentially competitive long distance ("interexchange") and manufacturing businesses was inherently anticompetitive. This integration meant that the Bell System had the ability and incentive to use its local exchange monopolies to impede competition in these related businesses—by discriminating in providing access to essential facilities, engaging in predatory pricing and cross-subsidization, and otherwise.

In that litigation, AT&T (as the then-parent of the Bell System) vigorously opposed these claims. AT&T defended the challenged conduct of the local Bell monopolies. AT&T further claimed that the Bell System was more efficient than any alternative and that it would

lead to increased costs and inefficiencies if the Bell System were split between its local exchange monopolies and its long distance and manufacturing businesses. Common Channel Signalling was identified as one of many areas in which increased costs and lost efficiencies would result. *See, e.g.*, D-T-1, pp. 44-48 (C.A. J.A. 65-69).

However, it became painfully apparent that this integration of monopoly and competitive businesses would continue to be a source of incessant controversies and crippling uncertainty, regardless of how the pending cases were resolved. Accordingly, on January 8, 1982, AT&T and the United States agreed to a Decree that was designed to put an end to these antitrust controversies in the only way possible: by prohibiting any affiliation between the local Bell telephone monopolies and the related competitive businesses in which those local monopolies can be used to impede competition.

The Decree has two principal sets of interrelated provisions which are, as the Justice Department said in 1982, "opposite sides of [a single] coin." Tr. 25179 (C.A. J.A. 179b). First, Section I(A) of the Decree split the integrated Bell System between its bottleneck local monopolies and its potentially competitive long distance and manufacturing businesses by ordering AT&T to divest the local exchange monopolies to the seven RBOCs. To implement this division, Sections II(A) and (B) of the Decree require the RBOCs to deliver traffic to AT&T at specified points within each of the RBOCs' "exchanges" or "LATAs" and require the RBOCs to extend the same rights to AT&T's competitors.

Second, other provisions prohibit the eight post-divestiture entities from recreating the combinations that divestiture ended. Section I(D) of the Decree prohibits the post-divestiture AT&T from reacquiring any divested assets. Correlatively, Section II(D) and Section VIII(C) prohibit the divested RBOCs from providing long distance services, manufacturing equipment, and engaging in

other competitive businesses until such time as an RBOC can show that it cannot use monopoly power to impede competition in a market it seeks to enter.

The Decree was entered following extensive Tunney Act proceedings in which the Bell System and Justice Department each stated that their mutual purpose in agreeing to the Decree was to end "the structural problems that had given rise to the antitrust controversies between the United States and AT&T over the last three decades" [2] and thereby to prevent any "recurrence of the type of discrimination and cross-subsidization that were the basis of the AT&T lawsuit." *Decree Opinion*, 552 F. Supp. at 147. In this regard, whereas AT&T stated that neither divestiture nor the line of business restrictions were "[its] idea" (*see* Pet. 21 n.19), AT&T made it explicit that it had agreed to the Decree to end any potential for abuses and controversies, and AT&T explicitly *opposed* the proposals to eliminate the line of business restrictions on the divested RBOCs.[3]

The District Court approved the Decree's interexchange, manufacturing, and other line of business restrictions on the ground that there was a strong likelihood the divested RBOCs otherwise would use their local

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[2] Department of Justice's Competitive Impact Statement, p. 8 (Feb. 10, 1982) (C.A. J.A. 105); *accord id.*, pp. 25-26 (C.A. J.A. 112); May 21, 1982 AT&T Reply to Public Comments, pp. 1-2, 40-46, 135-37 (C.A. J.A. 131, 137-42, 148).

[3] *See, e.g.*, May 21, 1982 AT&T Reply, pp. 104, 105 & nn.** (opposing removal or automatic sunset on ground that line of business restrictions will be required so long as the RBOCs retain regulated exchange monopolies that can be leveraged into the particular competitive market) (C.A. J.A. 146); June 14, 1982 AT&T Reply, pp. 16-17 (refuting contentions that the divested RBOCs would not be "financially viable" unless the line of business restrictions were removed) (C.A. J.A. 159-60); Tr. 25211 (the line of business restrictions are required by the Decree's antitrust theory and AT&T "stand[s] by it") (C.A. Supp. J.A. 13).

exchange monopolies to impede competition in these competitive markets. *Decree Opinion*, 552 F. Supp. at 185-95.

At the same time, the District Court recognized that developments "over time" might cause the RBOCs to "lose the ability to leverage their monopoly power" into these competitive markets and that "the need for the restrictions" would then disappear. *Id.* at 194-95 & n.266. To assure that the restrictions would be removed before they became anticompetitive and "[t]o avoid any [future] question about the appropriate test," the court required that the Decree explicitly adopt the same "standard for removal of the restrictions" that had been applied in imposing the line of business restrictions (and in ordering AT&T's divestiture of *each* of the RBOCs). *Id.* This standard is set forth in Section VIII(C):

> The [line of business] restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

The Decree thus rests on explicit findings that it is in the public interest to prohibit each of the seven divested RBOCs from participating in interexchange, manufacturing, and other markets as long as they have local exchange monopolies that can be used to impede competition.

In this regard, while the Justice Department has recently sought to repudiate this antitrust determination and has supported legislation to overrule it in part, these provisions of the Decree have been defended in Congress by a broad spectrum of the Nation's antitrust experts: Robert Bork, Phillip Areeda, and Lawrence Sullivan.[4]

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[4] *See* Written Statements of Robert Bork, Phillip Areeda, and Lawrence Sullivan, *Competition Policy in the Telecommunications Industry: A Comprehensive Approach (Part II), Hearings Before the Subcomm. on Economic and Commercial Law of the House*

2. Proceedings Between 1982 and 1990. In the years since the Decree's entry, there have been many disputes involving the Decree's line-of-business and other restrictions on the divested RBOCs. Until the events that gave rise to this appeal, all the parties to the Decree recognized that the post-divestiture AT&T has a right under Sections III, VII, and VIII(C) of the Decree to maintain and enforce the restrictions on the RBOCs in accordance with the terms and original purposes of the Decree. Between 1983 and 1990, AT&T repeatedly exercised its right under Section VII of the Decree to file motions to enforce the Decree's restrictions on the RBOCs—motions which were often opposed by the Justice Department—and AT&T opposed numerous proposed modifications that the RBOCs and Justice supported.[5]

During this period, no one disputed AT&T's legal and equitable interest in maintaining and enforcing the restrictions. To the contrary, the Justice Department defended its own failure to enforce the Decree's restrictions on the RBOCs by relying on AT&T's "right to seek enforcement" of these restrictions "at any time." Pet. 18a. Similarly, the Justice Department and the RBOCs did not dispute that the Section VIII(C) standard governed RBOC modification requests opposed by AT&T,[6] and the

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Comm. on the Judiciary, 102d Cong., 2d Sess. (Feb. 19, 1992) (attachment to testimony of Robert E. Allen).

[5] *See, e.g.*, Feb. 17, 1984 AT&T Motion (C.A. J.A. 230-67); Oct. 17, 1984 AT&T Motion (C.A. J.A. 280-333); Nov. 6, 1986 AT&T Emergency Motion (C.A. J.A. 334-358); July 17, 1987 AT&T Emergency Motion (C.A. J.A. 416-28); March 16, 1990 AT&T Motion (C.A. J.A. 699-700) (motion seeking to impose additional obligations on the RBOCs pursuant to Section VIII(I)); March 13, 1987 AT&T Comments (C.A. J.A. 364-75) (opposing DOJ proposal to eliminate line of business restrictions); Nov. 16, 1988 AT&T Opposition (C.A. J.A. 429-43).

[6] *See, e.g., Triennial Review Appeal*, D.C. Cir. Nos. 87-5388 *et al.*, DOJ Br., p. 17 (April 1989) (Section VIII(C)'s "language, together with any evidence of contemporaneous understanding of its

D.C. Circuit twice so ruled. *Triennial Review Opinion*, 900 F.2d 283, 292, 294-95, 301-05 (D.C. Cir. 1990); *NYNEX Procurement Opinion*, 907 F.2d 1205, 1207-08 & n.3 (D.C. Cir. 1990).

3. The Instant Dispute and the Decisions Below. The instant dispute arises from a modification that was proposed by U S West and then joined by the other six RBOCs. The proposed modification would have excused the RBOCs from their Section II(A) and (B) obligations to deliver signalling to AT&T (and others) at "signalling transfer points" ("STPs") in each of the RBOCs' LATAs and would have allowed the RBOCs to provide the interexchange service of carrying the signalling information across LATA boundaries.

In their motions, the RBOCs sought a blanket, unconditional modification that would allow them to transport signalling information to a single centralized point. The RBOCs claimed that the costs of putting STPs in each LATA were prohibitive for them and for smaller interexchange carriers. At the same time, the RBOCs *refused* AT&T's invitation that they seek a waiver that was tailored to the genuine problems that the RBOCs (and smaller interexchange carriers) faced in establishing signalling transfer points and using CCS signalling in certain rural and less-populated LATAs.

Contrary to the RBOCs' misstatement (BellSouth Pet. 9), the overwhelming majority of both small and large interexchange carriers opposed the blanket modification that

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meaning, establishes the standard for modification of the line of business restrictions"); *id.*, RBOC Section VIII(C) Br., p. 57 & *passim* (Apr. 17, 1989) *and* RBOC Information Services Br., pp. 17-21 (Apr. 17, 1989) (arguing "legally correct section VIII(C) standard" applied to RBOC motions that were opposed only by AT&T, even where DOJ had supported RBOCs' motion to remove certain restrictions, and that the "public interest" test applied to motions that no Decree party had opposed).

the RBOCs sought,[7] and no interexchange carrier supported the RBOC's appeal. Similarly, although the Justice Department supported the RBOCs' motion, it performed a "perfunctory" analysis that rested on the curious ground that the waiver opponents had not shown that competitive "benefits" justified the costs the RBOCs alleged. Pet. 25a-26a.

On July 13, 1990, the District Court denied the RBOCs' proposed modification on the ground that the RBOCs had not made the showing required by Section VIII(C). Pet. 44a-53a. In an August 1990 reply brief on reconsideration, the RBOCs then argued, for the first time in eight years of Decree litigation, that Section VIII(C) does not apply to RBOC modification requests supported by the Justice Department and that such a modification must be granted so long as it is found to be within the broad reaches of the public interest.[8] The Justice Department did not support this argument in the District Court, and the court held that there was not "the slightest support" for it. Pet. 55a n.1.

D.C. Circuit Decision. On appeal, the Justice Department for the first time supported the RBOCs' argument

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[7] *See, e.g.*, May 11, 1989 MidAmerican Long Distance Co. Response, pp. 5-6 (C.A. J.A. 660-61); Apr. 17, 1989 ALC Communications Corp. Response, pp. 11-15 (C.A. J.A. 561-65); Apr. 17, 1989 CompTel Response, pp. 7-8 (C.A. J.A. 558-59); Mar. 24, 1989 US Sprint Response, pp. 1, 4-5 (C.A. J.A. 533-35); Mar. 22, 1989 MCI Opposition (C.A. J.A. 502-523); Mar. 15, 1989 AT&T Response (C.A. J.A. 491-501).

[8] The RBOCs rested this latter argument on the D.C. Circuit's intervening *Triennial Review Opinion*, 900 F.2d 283 (D.C. Cir. 1990). Ironically, that opinion had stated that the Section VIII(C) standard applied to RBOC motions that were opposed only by AT&T —which was the procedural posture of the CCS motion. However, the RBOCs relied on a footnote in the Opinion that purportedly suggested that a different standard might apply if DOJ filed the motion (as DOJ did neither there nor here). *See id.* at 294 n.12.

that Section VIII(C) is inapplicable to RBOC motions that the Department supports. However, the D.C. Circuit rejected this argument and affirmed.

First, the D.C. Circuit held that modification requests cannot be granted, over AT&T's objection, unless the Section VIII(C) standard is satisfied. The court held that the Decree's language is "not ambiguous" and establishes AT&T's "legal and equitable" interest in maintaining the restrictions in accordance with their terms and original purposes. *See* Pet. 16a, 22a. The court reasoned that "Section III treats AT&T as a formal party to the *entire* decree, with specific authority under Section VII to demand enforcement of *any* section of the agreement" and that the language of Section VIII(C) is fully applicable to requests opposed by any such party to the entire Decree. Pet. 18a (emphasis in original).

The court also noted that the unambiguous meaning of the Decree's text was supported by (1) the stated premises of the Decree from the contemporaneous Tunney Act proceeding (Pet. 16a-17a), (2) the fact that the RBOCs' interpretation would "infringe[]" and "devalue[]" other AT&T rights and obligations under Sections I(A) and II(A) and (B) and Appendix B of the Decree (Pet. 20a n.15),[9] and (3) the interpretations, positions, and practices of the Department, the RBOCs, and the courts during the first eight years after the Decree's entry (Pet. 22a-24a).

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[9] In particular, the D.C. Circuit stated that although it did "not think [that] a particular examination of AT&T's rights and interests is called for under the decree in order to conclude that AT&T has every right to force a section VIII(C) examination of the CCS proposal," nonetheless "it appears that AT&T would qualify" under such a standard. Pet. 20a n.15. The CCS waiver, if granted, would reduce the value of assets allocated to AT&T under the plan of reorganization implementing the Decree, for at divestiture "the Bell System's widespread signaling facilities [including CCS facilities] were allocated to AT&T." *Id.* AT&T therefore had "a cognizable and unique interest (vis-a-vis other interexchange carriers) in the CCS waiver." *Id.*

In this regard, the Court of Appeals rejected the RBOCs' arguments that the plain meaning of the Decree could have been altered by the 1982 statements of Bell System representatives (who now work for AT&T) that the restrictions (and divestiture) were a bad idea, but had been agreed to in order to avoid greater evils. Quite apart from the fact that there were other such statements "demonstrating more affirmative interest in the prohibitions" (Pet. 19a), the court noted that the statements were made on behalf of the unified Bell System, that they simply reflected the Bell System's longstanding positions, and that, in all events, the statements did not relate to the rights that the *post*-divestiture AT&T would possess under Sections III, VII, and VIII(C). Pet. 19a-20a.

Finally, the D.C. Circuit rejected the dissent's and the Justice Department's suggestion that AT&T should lack " 'antitrust standing' " on the theory that AT&T would be somehow preventing legitimate competition by the RBOCs. Pet. 21a (quoting Pet. 39a). The majority noted that "the flaw in our colleague's reasoning . . . is that he entirely ignores the potential anticompetitive leverage that the BOCs' monopoly position in the bottleneck local markets affords their entry into the interexchange markets. Pet. 21a-22a. The D.C. Circuit further noted that "Section VIII(C) does not give AT&T the power to veto truly procompetitive line-of-business modifications." Pet. 22a. In any event, the D.C. Circuit held that Judge Williams's and the Department's suggestions were pertinent, at most, to how a different decree might have been drafted:

> [T]he question before us is not how we would fashion the decree if we were writing on a clean slate. The decree is not ambiguous; it gives AT&T the right, as a party to the decree, to assert its objection to the BOCs' proposal and thus to invoke section VIII(C).

Pet. 22a.

Second, after reaffirming the applicability of Section VIII(C), the D.C. Circuit upheld the District Court's conclusion that the proposed blanket waiver of the interexchange restriction had not satisfied this standard. The court stated that a blanket waiver would impede competition by "tak[ing] a piece of the interexchange market completely out of competition." Pet. 27a. The D.C. Circuit also expressed skepticism about the cost savings that the RBOCs claimed. Pet. 28a-29a & n.20. In particular, although the RBOCs claimed it would be prohibitively expensive to install STPs "in *some* LATAs," the D.C. Circuit noted that "their position is undercut by their insistence on a blanket, nationwide waiver rather than transitional waivers for only those particular LATAs—waivers that AT&T has stated it would not oppose and that we too would be likely to view sympathetically." Pet. 28a.[10]

4. **Subsequent Developments.** Within days of the court of appeals' decision, U S West, the lead RBOC in this proceeding, filed a new waiver request. Whereas U S West had previously stated that it was infeasible and prohibitively expensive to install STPs in more than 6 of its 26 LATAs, U S West revealed that it had already installed STPs in 23 of its 26 LATAs in the interim period and would install STPs in the remaining LATAs by December 31, 1996.[11] Accordingly, U S West now sought

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[10] *This* is the ground on which GTE obtained a modification of its separate decree. *See* Pet. 57a-61a. Contrary to the RBOCs' misstatement (Pet. 15-16), in granting this waiver the District Court did not rely on differences in the legal standard. Instead it relied on the fact that GTE is different from any individual RBOC because virtually all GTE's 101 LATAs are rural. *See* Pet. 60a (noting this "fundamental, substantive difference between the two situations"); *see also United States* v. *GTE Corp.*, 603 F. Supp. 730, 733-36 (D.D.C. 1984).

[11] *See* Aug. 12, 1992 Letter from Jeffrey S. Bork, U S West, to Richard L. Rosen, DOJ (submitting motion); Oct. 15, 1992 U S West Motion.

only a modest transitional waiver allowing it to delay installations in its three most rural LATAs until that date. This was the type of waiver that AT&T had stated for years that it would not oppose, and the District Court promptly granted it. *See Order* (D.D.C. Nov. 10, 1992). The other RBOCs have not had to seek even transitional waivers.

REASONS FOR DENYING THE WRIT

The D.C. Circuit's decision does not present any question that warrants review by this Court. The decision applies settled principles of consent decree interpretation to particular provisions of one antitrust consent decree. The decision does not conflict with any decision of this Court or of any other court, and given the D.C. Circuit's exclusive role in interpreting the Decree, there is no possibility of conflicting interpretations of it. Nor does the decision have importance for other existing, or future, decrees. As the United States stated below, "this case presents an unusual situation . . . [w]e are not aware of any other case in which a similar situation has arisen." DOJ C.A. Br. 23.

In these circumstances, the only way petitioners can argue for review is by advancing a series of contrived claims that ignore settled law, that misstate the D.C. Circuit's decision, and that, in one instance, was not even raised below. Petitioners' claims ultimately reduce to attempts to relitigate factual claims that were properly rejected below and that are otherwise inappropriate for review by this Court. That is especially so because intervening events establish that the underlying dispute has little practical significance.

I. THE D.C. CIRCUIT'S DECISION IS A CORRECT APPLICATION OF SETTLED PRINCIPLES OF CONSENT DECREE INTERPRETATION AND DOES NOT CONFLICT WITH ANY OTHER DECISION.

The principles that govern the construction of consent judgments are well settled. A consent decree "is to be construed basically as a contract." *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975).[12] A court is to examine the "four corners" of the instrument and such "aids to construction" as the "circumstances surrounding the formation of the consent order" (420 U.S. at 238) and the prior positions and course of dealings among the parties. *See, e.g., United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 23-24 (1959); *Restatement of Contracts* 2d § 223(1); 4 *Williston On Contracts*, § 623 (1961).

1. The D.C. Circuit applied these principles in holding that the 1982 AT&T Consent Decree gives AT&T a right to maintain and enforce the Decree's line of business restrictions on the RBOCs in accordance with the Decree's terms. Contrary to the RBOCs' misstatement, the court focused on the "peculiarities of this particular decree" (*compare* Pet. 11, 16), and the D.C. Circuit's holding establishes that AT&T *is* an "intended beneficiary" of the Decree provisions at issue (*compare* Pet. 21).

The D.C. Circuit relied, first and foremost, on the unambiguous terms of the Decree. It noted that Section III expressly makes AT&T a party to all the provisions of the Decree, including the restrictions on the RBOCs, and that Section VII of the Decree gives AT&T explicit

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[12] *Accord United States* v. *Armour & Co.*, 402 U.S. 673, 681-82 (1971); *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959); *see also Rufo* v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748, 757 (1992); *Chrysler Corp.* v. *United States*, 316 U.S. 556 (1942); *Ford Motor Co.* v. *United States*, 335 U.S. 303 (1948).

rights to apply to the District Court "at any time" for enforcement or compliance with the Decree's line of business restrictions in accordance with their terms. Finally, the court noted the language of Section VIII(C) is fully applicable to modifications opposed by AT&T.

Second, the "circumstances surrounding the formation of the Decree" supported the obvious import of the Decree's plain terms. The D.C. Circuit noted what both original parties had made explicit in the 1982 Tunney Act proceedings: AT&T's divestiture of the RBOCs and the restrictions on the divested monopolies rested on the same ground. AT&T and the United States had agreed to each of these provisions "on the premise" that the RBOCs otherwise would likely "leverage that bottleneck control in the interexchange (long distance) market." Pet. 16a. Because "the local monopolies were taken away from AT&T" "*for that reason*," the court stated that to conclude that AT&T has no right to prevent an RBOC's " 'return' to the interexchange market, there to compete against AT&T with the same sort of local monopoly leverage that caused the government to bring suit against AT&T in the first place, has an ironic, even Kafkaesque quality." Pet. 16a-17a (emphasis in original).

Contrary to petitioners' persistent misstatements (*e.g.*, Pet. i), the D.C. Circuit also recognized that the proposed modification of the line of business restrictions would directly "infringe" AT&T's other "rights narrowly expressed" under Sections I(A) and II(A) and (B) of the Decree. Pet. 20a n.15. In particular, the court recognized that the value of these assets that the Decree required AT&T to accept would be adversely affected under the proposed blanket waiver and that AT&T's separate Decree obligations were premised on the maintenance of the restrictions on the RBOCs in accordance with the Decree's terms and purposes. *See* p. 9 & n.9, *supra*.

Finally, the D.C. Circuit relied on the prior positions of the Justice Department, the RBOCs, and the courts

during the first eight years following the Decree's entry. As the D.C. Circuit held, the Justice Department previously had expressly recognized AT&T's rights to maintain and enforce the restrictions on the RBOCs; the Department and the RBOCs had assumed those rights in prior appeals; and the D.C. Circuit had twice concluded, without objection, that Section VIII(C) applies to modification requests that are supported by the RBOCs and Justice, but opposed by AT&T. *See* Pet. 16a, 22a-24a.

Indeed, these latter factors would be dispositive under this Court's decisions, even if the AT&T Decree's terms were not unambiguous. As this Court has held, the meaning of such a decree is fixed by the prior interpretations of those "government officials who drew up and administered the Decree from the start" and a decree's meaning cannot be changed when, as here, new personnel attempt to "renounce[]" prior interpretations. *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 23-24 (1959). These principles have special force in this case because the Decree is not ambiguous and because it is not just the Justice Department, but *all* other parties to the Decree and the court itself that consistently adopted the same position.

Petitioners have no response to these points. Indeed, the only way the RBOCs can advance their contrary claims is by ignoring the principle that consent decrees are to be construed as contracts. Their principal claim appears to be that there should be a "common law" rule against the provisions at issue because otherwise an "alleged antitrust violator" may "block" procompetitive modifications that are required by the "public interest." *E.g.*, Pet. 11, 12-16, 19-23.

This contention is not only inconsistent with the contractual nature of consent decrees, but it is factually wrong, for two reasons. First, the RBOCs ignore the fact that the line of business restrictions were imposed on the RBOCs because *they* inherited the local Bell bottleneck monopolies that can be used to impede interexchange

competition in violation of the antitrust laws. That is why the RBOCs are prohibited from providing long-distance services (*e.g.*, to cellular radio customers, *see* Pet. 14 & n.10), and why the post-divestiture AT&T is not. Second, as the D.C. Circuit held, Section VIII(C) was added to the Decree to assure that the line of business restrictions would be modified if and when the antitrust laws required, and, as a result, Section VIII(C) *denies* "AT&T the power to veto truly procompetitive line-of-business modifications." Pet. 22a.[13]

In short, the decision below correctly gives effect to the unique provisions of the AT&T Decree that have been found to promote the antitrust laws and to be in the public interest.

2. For these same reasons, the D.C. Circuit's decision does not conflict with the decision of any other court. Indeed, the most the RBOCs can claim (Pet. 23) is that the decision "conflicts in principle" with "numerous decisions"—all of which, of course, arose under different decrees containing different language. It is not clear what the RBOCs mean by a "conflict in principle." However, there would not be a conflict of any type here even if all the other decrees at issue were identical to the 1982 AT&T Decree.

The four district court decisions cited by petitioners (Pet. 24 n.25) stand only for the unexceptional principle that the "public interest" standard applies when no

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[13] Similarly, the RBOCs continue to seek to qualify the post-divestiture AT&T's explicit rights by invoking the earlier statements of Bell System representatives that the restrictions were a bad idea, but that the Bell System agreed to them and to divestiture to avoid greater evils. Quite apart from the fact that these statemens are meaningless in themselves and were contradicted by other contemporaneous Bell System statements from that year (*see* Pet. 19a; p. 4 n.3 & p. 10, *supra*), these statements did not address the rights of the *post-divestiture* AT&T and are irrelevant to the construction of Sections III, VII, and VIII(C). The D.C. Circuit rejected this claim for this reason. Pet. 19a-20a.

party challenges a requested modification. That is the rule under the AT&T Consent Decree as well.[14]

Similarly, petitioners have not cited a single case that even indirectly supports their claim that the "public interest" standard can apply when a party to a decree objects to a modification that is sought or supported by the government and that would deny the objecting party of rights conferred by the decree. To the contrary, the cases uniformly hold that the standard applicable to those motions is not a lenient "public interest standard," but whether the proposed modification would, given intervening changes in the facts or the law, serve to "effectuate or to thwart the basic purpose of the original consent decree." [15] In the AT&T Decree, the parties codified that "basic purpose" in Section VIII(C). Similarly, petitioners can cite no case that holds that the "public interest" standard applies when a modification is supported

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[14] *See* Pet. 14a ("proposed modifications of the line-of-business restrictions that were unopposed by the other two parties to the decree" are evaluated under the "public interest" standard); *Triennial Review Opinion*, 900 F.2d at 295, 301-07 ("public interest" standard applies to modification sought by BOCs, supported by DOJ, and unopposed by AT&T; but Section VIII(C) standard applies when AT&T opposes modification sought by BOCs and supported by DOJ).

[15] *Chrysler Corp.* v. *United States*, 316 U.S. 556, 562 (1942) (applying this test to modification of sunset provision that benefited defendant); *see also Rufo* v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748, 760 (1992) (modification appropriate if government shows "a significant change in factual conditions or in law" that is inconsistent with premises of the Decree); *Ford Motor Co.* v. *United States*, 335 U.S. 303, 320-22 (1948) (DOJ failed to show "good cause" to support modification of consent decree); *United States* v. *International Harvester Co.*, 274 U.S. 693, 702-10 (1927) (terms and purpose of consent decree require denial of DOJ modification request); *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 509 (1941); *United States* v. *RCA*, 46 F. Supp. 654, 656 (D. Del. 1942) (applying heightened review standard to Justice Department effort to vacate decree provisions that benefit objecting party), *appeal dismissed*, 318 U.S. 796 (1943).

by the government and a restricted party, but opposed by another party that has rights under the decree provision at issue. The few decisions that address the latter issue are in accord with the decision below.[16]

II. BELLSOUTH'S SEPARATION OF POWERS CLAIM WAS NOT RAISED BELOW AND IS MERITLESS.

There is also no basis for the separate petition for certiorari filed by BellSouth (No. 92-879). It does not dispute that the Decree's terms give AT&T a legal and equitable interest in maintaining the restrictions on the RBOCs in accordance with the Decree's terms. However, BellSouth argues that it is a violation of separation of powers—and interferes with the prosecutorial discretion of the "Executive"—to give effect to these provisions of the AT&T Decree, which the Executive itself had here proposed.

The short answer to this separation of powers claim is that it was not raised below[17] and, as BellSouth concedes

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[16] *See Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 507-09 (1941) (where third party was given rights to intervene to enforce the restriction that an antitrust consent decree imposed on original defendant, this Court reversed the District Court for modifying the restriction on joint motion of defendant and government under the public interest standard and held instead that the District Court must, in modifying the decree, "adjust the right which belongs to [the intervenor] with full regard to the public interest *which underlay the original suit*") (emphasis added); Pet. 19a n.14 (discussing *Missouri-Kansas Pipe Line*); *United States* v. *United States Gypsum Co.*, 124 F. Supp. 573, 580-81 (D.D.C. 1954) (three-judge court) (even when Attorney General is representative of "public interest," "where a dissolution decree by specific statement or fair implication therein accords rights to parties thereto, they have a standing, in the main suit, to enforce such rights in a manner consonant with the underlying purposes of the decree"), *aff'd in rel. part, rev'd in part sub nom. United States Gypsum Co.* v. *National Gypsum Co.*, 352 U.S. 457 (1957).

[17] BellSouth concedes that "neither BellSouth nor the other BOCs interposed express constitutional objections." BellSouth Pet. 13. Nor did DOJ. The single-sentence footnote that BellSouth cites

(Pet. 15), "the Court of Appeals made no reference to" any such issue in its decision. In any event, the decision below presents no separation of powers issue that warrants review.

Here, too, the only way BellSouth can argue otherwise is by misstating the terms of the Decree and of the D.C. Circuit's decision. Contrary to BellSouth's claim (BellSouth Pet. 20-23), the decision has no effect on the Justice Department's exercise of its prosecutorial discretion to decide whether to bring proceedings to enforce any provision of the Decree or of the antitrust laws. That AT&T has rights to maintain and enforce Decree provisions in accord with their terms does not interfere with the Department's decision whether it will prosecute violations of the Decree. The Department will continue to have every right itself to refuse to enforce this Decree (as the Department in fact declined to do for a number of years).

Indeed, rather than violate separation of powers, the fact that the Executive can negotiate decrees with provisions such as Section VII and Section VIII(C) *enhances* the Executive's prosecutorial ability to settle cases. The reality is that private parties often will not enter into such a dissolution decree unless the parties can be given rights to maintain and enforce its provisions. The decision to give effect to these rights thus gives the Executive greater latitude to negotiate settlements.

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from the Department's Brief below is irrelevant. *See* BellSouth Pet. 14 (citing DOJ C.A. Br. at 22 n.34). That sentence simply makes the same point raised in the dissenting opinion in *Maryland* v. *United States*, 460 U.S. 1001 (1983): that "constitutional questions" could arise if a court applied heightened scrutiny to Executive decisions through "judicial review under the 'public interest' standard." But *that* issue dropped out of this case once the Court of Appeals construed the Decree to apply Section VIII(C)'s legal standard rather than an amorphous "public interest" test. Even if uncabined judicial review presents a constitutional issue under a "public interest" standard, that issue is not presented when a court applies a distinct, judicially manageable legal standard such as that in Section VIII(C).

BellSouth's separation of powers claims are also contrary to this Court's decisions. Dissolution and other decrees in government suits routinely contain decree provisions that create enforceable rights among the private parties,[18] and this Court has held that the existence of private enforcement rights in government decrees could not "be deemed remotely in conflict with the public duties of the Attorney General." *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 504-09 (1941). In turn, these cases uniformly apply a test that is more stringent than the "public interest standard" to modifications proposed by government. *See* pp. 17-18 & nn.15-16, *supra* (and cases cited). By contrast, BellSouth has not cited a single case in support of its theory that these holdings violate separation of powers.[19]

III. IN ANY EVENT, REVIEW IS INAPPROPRIATE BECAUSE OTHER AVENUES OF RELIEF HAVE BEEN IGNORED AND BECAUSE THE DISPUTE HAS LITTLE PRACTICAL SIGNIFICANCE.

Finally, this decision is peculiarly inappropriate for review for two additional reasons.

First, petitioners have come to this Court after having failed to avail themselves of ordinary avenues for correcting the errors they allege. Because Section VII of the Decree provides that the District Court for the District of Columbia retains jurisdiction over Decree matters, all litigation under the Decree is confined to the D.C. Circuit, and the D.C. Circuit has now decided at least nine cases

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[18] *See, e.g., United States Gypsum Co.* v. *National Gypsum Co.*, 352 U.S. 457 (1957); *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502 (1941); *Terminal Railroad Ass'n* v. *United States*, 266 U.S. 17 (1924) (and cases cited).

[19] In this regard, because Section VIII(C) is a judicially manageable standard, the concerns that were expressed when the Decree was entered have no pertinence to its ongoing administration. *Compare Maryland* v. *United States*, 460 U.S. 1001, 1003-1006 (1983) (Rehnquist, J., dissenting).

under the Decree.[20] As petitioners recognize (Pet. 12), the D.C. Circuit functions for the AT&T Decree much as the Federal Circuit functions in patent cases: it ensures the development of nationally uniform law under the AT&T Decree.

The D.C. Circuit's unique role means that a case under the Decree should be brought to this Court, if at all, only after *en banc* review has been sought in the D.C. Circuit. Petitioners concede these points in principle, but claim that *en banc* review is not feasible "[s]ince an unusual number of judges on the D.C. Circuit are recused." Pet. 12. That is simply wrong. There are eleven active judges on the D.C. Circuit, and, to date, eight have participated in appeals under the AT&T Decree.[21] The RBOCs' failure to seek *en banc* review is inexcusable.

Second, events subsequent to the D.C. Circuit's decision establish that the dispute that led to the proposed modification no longer has much if any practical significance for the administration of the Decree. Despite the prior claims that it would be prohibitive to install STPs in more than a handful of LATAs, U S West has now in-

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[20] *See Common Channel Signalling Opinion*, 969 F.2d 1231 (D.C. Cir. 1992); *NYNEX Procurement Opinion*, 907 F.2d 1205 (D.C. Cir. 1990); *Gateway Opinion*, 907 F.2d 160 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991); *Triennial Review Opinion*, 900 F.2d 283 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990); *Definition of Manufacturing Opinion*, 894 F.2d 1387 (D.C. Cir. 1990); *Conditional Interest Opinion*, 894 F.2d 430 (D.C. Cir. 1990); *FTS Price Discrimination Opinion*, 846 F.2d 1422 (D.C. Cir.), *cert. denied*, 488 U.S. 924 (1988); *Southwestern Bell Paging Opinion*, No. 89-5106 (D.C. Cir. Oct. 17, 1990) (unpub.); *Line of Business Restrictions Opinion*, 797 F.2d 1082 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 922 (1987).

[21] *See, e.g.*, Order, *Royalty Appeal*, No. 92-5079 (D.C. Cir. Nov. 5, 1992) (*Wald, Williams, Buckley*); Pet. 3a (*Silberman*, Williams, *Sentelle*); *Southwestern Bell Paging Opinion*, No. 89-5106 (D.C. Cir. Oct. 17, 1990) (Silberman, Williams, *Randolph*); *Triennial Review Opinion*, 900 F.2d 283 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990) (*Mikva, Edwards*, Silberman).

stalled STPs in 23 of its 26 LATAs, and has secured a transitional waiver to install STPs in the remaining three LATAs by 1996. *See* pp. 11-12, *supra*. The other six RBOCs have not even had to seek transitional waivers. Although these events do not render the controversy moot, they mean that the practical significance of the dispute that gave rise to the blanket waiver request is radically diminished, and near to the vanishing point.

Moreover, even if the issue had practical significance, there is nothing in the decision below that would preclude petitioners from renewing their request for broader relief, provided they simply make the traditional antitrust showing set forth in the Decree that there is "no substantial possibility" that they will abuse their monopolies. The Department of Justice, too, can readily shape the Decree's administration if it provides more than "perfunctory" (Pet. 25a) market analysis to support its policy preferences. Thus, in addition to all the other reasons review is inappropriate, this case has little practical significance.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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Nos. 92-848, 92-879

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERITECH CORPORATION, *et al.*,
Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENT MCI COMMUNICATIONS CORPORATION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT MCI COMMUNICATIONS CORPORATION

Respondent MCI Communications Corporation [1] ("MCI") opposes the Petitions for Certiorari in Nos. 92-848 and 92-879.

Petitioners have advanced no persuasive argument for plenary review. They have identified no conflict with any

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[1] MCI Communications Corporation provides long distance and information services through wholly owned subsidiaries. It has no parent company. *See* S. Ct. Rule 29.1.

decision of another federal court of appeals or state supreme court. They have identified no conflict with a prior decision of this Court. Nor have they identified any important legal principle of general application at stake in this case.

It is certainly true, as Petitioners contend, that the consent decree at issue—the 1982 Modification of Final Judgment ("MFJ")—is uniquely important. The MFJ broke up the Bell system and ushered in a new era of competition in telecommunications markets. The MFJ established "line-of-business" restrictions as structural remedies in the markets for long distance services, information services and manufacturing telecommunications equipment. The line-of-business restrictions protect these newly competitive markets from future abuse by the new owners of AT&T's former local telephone monopolies—the Bell Operating Companies ("BOCs"). Competitors in those markets are dependent on fair access to local telephone networks. By prohibiting the BOCs from participating in these access-dependent markets, the decree eliminated their incentive to abuse their control over the bottlenecks.

The overall importance of the decree does not, however, justify plenary review of the particular questions raised in the petitions for certiorari. The petitions raise extremely narrow, derivative issues that may well be mooted by the resolution of overarching issues of MFJ interpretation presented to this Court in the near future. *See* pages 6-7 *infra*. Moreover, as will be demonstrated, the district court and the court of appeals were plainly correct both in the standard of review they applied to the proposed decree modification at issue and in the result reached applying that standard. *See* pages 8-12 *infra*.

STATEMENT OF THE CASE

1. Questions of decree modification under the MFJ are not governed by traditional equitable principles generally applicable to consent decrees. *Cf. United States v. Swift & Co.*, 286 U.S. 106 (1932). The parties to the MFJ, including Petitioners, expressly agreed that requests to remove the "line of business" restrictions on the Bell Operating Companies should be governed by a different standard. The parties' mutual agreement is embodied in Section VIII(C) of the MFJ, which states:

> The restrictions imposed upon the separated BOCs by virtue of Section II(D) [which sets forth the line-of-business restrictions] shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

MFJ, § VIII(C); Appendix to Petition for Certiorari in No. 92-848 (Pet. App.) 75a. The district court insisted on the inclusion of Section VIII(C) to "remove any doubt about the appropriate test" for requested modifications of the line-of-business restrictions. *United States v. AT&T*, 552 F. Supp. 131, 194 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

2. On its face, Section VIII(C) plainly dictates application of the "no substantial possibility" standard to requests for modification of the line-of-business restrictions. Before this Court, Petitioners do not dispute that the BOCs' present request to provide interLATA common channel signalling would require removal of a line-of-business restriction in Section II(D) of the MFJ. Section II(D) bars interexchange telecommunications service by the BOCs, and the proposed common channel signalling crosses exchange borders. Thus, as both the district court and the court of appeals concluded, the plain meaning of the MFJ dictated the standard of review to be applied

to this request, and required the BOCs to meet the "no substantial possibility" standard of Section VIII(C).

AT&T, joined by MCI and other intervenors, objected to this proposed modification on the ground that it extended the reach of the BOCs' monopoly and created substantial risks of anticompetitive harm. Because the BOCs were unable to negate the substantial possibility of anticompetitive harm identified by AT&T, MCI and others, the requested modification was properly denied. Pet. App. at 25a, 43a.

3. The BOCs nonetheless challenge the decisions below on the ground that Section VIII(C) should not apply to the instant request for modification. As the BOCs would have it, a more lenient "public interest" standard, rather than Section VIII(C), should apply because both the BOCs and the United States have agreed that the modification would be in the public interest. *See* Petition for Certiorari in No. 92-848, at 12-15. In essence, and notwithstanding the plain meaning of Section VIII(C), Petitioners contend that whenever the United States and a party restricted by a line-of-business restriction (i.e. a BOC) agree to remove that restriction, this lenient "public interest" standard should apply.

4. The BOCs purport to find support for that argument in a prior opinion of the court of appeals in a related proceeding under the MFJ, the Triennial Review. In *United States v. Western Elec. Co.*, 900 F.2d 283 (D.C. Cir.) (*"Triennial Review"*), *cert. denied*, 111 S. Ct. 283 (1990), the court held that Section VIII(C) dictated the standard of review only for *contested* modifications of the line-of-business restrictions. 900 F.2d at 295, 305-07. The court of appeals concluded that the decree parties intended Section VIII(C) to apply only when a party challenged a proposed removal of a line-of-business restriction. Absent a challenge, the court stated, the parties intended a lenient "public interest"

standard to apply.[2] The appeals court then remanded the case for application of this "public interest" standard to the BOCs' request for removal of the information services restriction unopposed by any decree party.[3]

5. The *Triennial Review* test for deciding what standard of review applies does not help Petitioners in this case, however, because all decree parties did not consent to the BOCs' proposed waiver for common channel signalling. Petitioners have, therefore, attempted to rewrite the *Triennial Review* decision. As Petitioners would have it, Section VIII(C) should apply only when the United States objects to a motion by a "restricted" party—*i.e.* a BOC—to remove a line-of-business restriction. Without so much as a nod to the mutual intent of the parties expressed in the MFJ, Petitioners seek support for this narrow application of the Section VIII(C) standard in general principles of decree administration and separation of powers, and in wholly unsubstantiated predictions as to which outcome below would better advance social welfare.[4]

6. As the court of appeals explained, however, the *Triennial Review* does not support this interpretation of the MFJ. Indeed, in that case, the court held that Section VIII(C) should apply to a BOC petition for removal of the decree's manufacturing restriction, even though the

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[2] Because neither the United States nor AT&T objected, the court applied that "public interest" standard to evaluate the BOCs' request for removal of the information services restriction. 900 F.2d at 305-07. The court applied the Section VIII(C) standard to evaluate the BOCs' request for removal of the restriction on manufacturing telecommunications equipment because AT&T objected, even though the United States did not. 900 F.2d at 301.

[3] The remand decision is presently pending on appeal before the District of Columbia Circuit.

[4] See also in this regard the brief of the United States Telephone Association submitted in support of the petitions.

United States consented, because AT&T opposed. 900 F.2d at 303-04. At the time, the BOCs did not seek rehearing or otherwise object to this application of Section VIII(C) to a BOC request to remove Section II(D)'s manufacturing restriction. Nor did they file a petition for certiorari challenging the panel's denial of the motion to modify the manufacturing restriction under Section VIII(C). The appeals court in this proceeding also noted that Section VIII(C) had been applied in another MFJ case in which AT&T, but not the United States, had objected to a proposed waiver of a line-of-business restriction. Pet. App. at 13a; *United States v. Western Elec. Co.*, 907 F.2d 1205, 1207-09 & n.3 (D.C. Cir. 1990). Indeed, the panel understandably expressed some surprise that the BOCs would advance this interpretation of Section VIII(C) *for the first time* some ten years after the MFJ was entered. Pet. App. 13a.

REASONS FOR DENYING THE PETITION

1. The questions of whether the MFJ intended to create different standards of review depending on whether a decree party contested a proposed modification of a line-of-business restriction, and, if so, of the proper content of the "public interest" standard for uncontested modifications, should be considered by this Court at the proper time. The instant case does not, however, raise these issues.

The critical question respecting the MFJ standard for modification of the line-of-business restrictions is whether the Section VIII(C) standard covers all modifications, contested or uncontested, or whether that standard applies only if a decree party (BOC, DOJ or AT&T) contests the modification. This is the issue decided in the *Triennial Review* decision. MCI and many other intervenors petitioned for certiorari on that issue in 1990. Because the *Triennial Review* decision resulted in a remand, however, the BOCs and the United States opposed the petition in part on the ground that the case was not

final.[5] As they noted, this Court would have the opportunity to pass on the question at the conclusion of court of appeals review after the remand. Certiorari was denied. 111 S. Ct. 283 (1990). The district court's *Triennial Review* remand decision is presently under submission in the court of appeals. When the appeals court renders its decision, this Court will have the opportunity to consider the issue. It appears likely that, however the court of appeals decides the pending appeal, the issue will be presented to this Court.

The question presented by Petitioners here is entirely derivative of that central issue. Petitioners seek a declaration whether AT&T's objection makes a proposed modification "contested" under Section VIII(C) as interpreted by the *Triennial Review* panel. If, as MCI contends based on the plain meaning of the decree language, Section VIII(C) properly applies to *all* requests to remove line-of-business restrictions, then the issue raised by Petitioners here is moot. Section VIII(C) would apply irrespective of whether any party contested a request to remove a line-of-business restriction. Deciding the question Petitioners raise here thus places the cart before the horse because it assumes the answer to a prior and more important issue on which this Court has not yet definitely spoken. It makes no sense to grant review on this derivative matter, the result of which would necessarily be contingent, when the central issue remains for a future case.[6]

2. Even assuming *arguendo* that the *Triennial Review*'s interpretation of Section VIII(C) is correct, the Petitions for Certiorari in this case raise no question warranting plenary review.

Petitioners claim that the decision below "has serious implications" for antitrust enforcement, administration of

[5] *See* Brief in Opposition of Respondent Regional Bell Operating Companies in No. 90-9, September 7, 1990, at 9, 20-22.

[6] The present case is, moreover, a poor vehicle for addressing the important predicate issue becasue it was not briefed or argued below.

multiparty consent decrees, and the separation of powers. Petition in 92-848, at 11. But that argument for review rests on a desperate caricature of the issues in this case. The court of appeals did not purport to set forth any general principle of law or equity empowering signatories to consent decrees, by virtue of making an objection, to dictate the standard of review to apply to proposed modifications.

Rather, this case raises the specific question whether the particular consent decree into which the parties to this case entered—the MFJ—requires the application of Section VIII(C) when AT&T objects to a proposed modification of a line-of-business restriction. That is, at bottom, a definitional question under the decree because the MFJ itself dictates the standard of review for proposed modifications of the line-of-business restrictions.

As the court of appeals concluded after applying traditional principles of decree construction:

> the question . . . is not how we would fashion the decree if we were writing on a clean slate. The decree is not ambiguous; it gives AT&T the right, as a party to the decree, to assert its objection to the BOCs' proposal and thus to invoke Section VIII(C).

Pet. App. 22a. *See United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-37 (1975); *United States v. Atlantic Refining Co.*, 360 U.S. 19, 23-24 (1959). Parties to a decree, including the United States, are free to negotiate for a standard to govern proposed future decree modifications. They have done so in the MFJ, and this case involves simply the question of what standards the MFJ embodies.

At bottom, Petitioners' position is simply a variant of an argument that this Court has repeatedly rejected in other cases. Petitioners seek to vindicate what they perceive as "public interest" considerations at the expense of the benefit of the bargain achieved by consent decree

parties. They argue as though interpretation of Section VIII(C) were entirely a matter of judge-made law, that could evolve in response to changing judicial conceptions of what the public interest requires. But this Court has made clear that decree signatories may not be deprived of the benefit of their bargain merely because another decree party, even the United States, subsequently believes the public interest would be better served thereby. *Atlantic Refining*, 360 U.S. at 23-24; *United States v. Armour & Co.*, 402 U.S. at 680-83.

3. In any event, the court of appeals' interpretation of the MFJ does not give AT&T "veto power" over procompetitive changes sought by the BOCs. *See* Petition in 92-848, at 12. Under Section VIII(C), the BOCs can win approval of any line-of-business modification that does not pose a substantial risk of harming competition in the line of business the BOCs seek to enter. This standard provides ample flexibility to accommodate procompetitive innovation and changed market conditions. Indeed, this test was adopted precisely because it afforded significantly more flexibility than did the traditional test for contested modifications set forth in *United States v. Swift & Co.*, 286 U.S. 106 (1932). *See United States v. AT&T*, 552 F. Supp. at 195 (adopting Section VIII(C) to enhance flexibility).

Section VIII(C) simply requires the BOCs to prove that a proposed modification will not bring about the very kinds of anticompetitive bottleneck monopoly abuse that led to the line-of-business restrictions in the first place. Both the district court and the court of appeals concluded that Petitioners failed to meet that standard, and their conclusion should not be reconsidered here. *See Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *United States v. Doe*, 465 U.S. 605 (1984).

4. The consequences for administration of consent decrees in multiparty cases are precisely the opposite of what Petitioners contend. *See* Petition in 92-848, at 11,

16. In the context of a multiparty consent decree, it is hardly surprising that the benefits to some parties depend on the restriction of other parties. Those mutual benefits and burdens are, quite simply, the quid pro quo for agreeing to enter into a decree rather than litigating a case to conclusion. As part of the natural process of accommodation and compromise, decree signatories give up something in order to obtain such benefits. Petitioners argue for a principle that would preclude decree signatories from claiming the benefit of a consent decree whenever a restricted party seeks to modify a restriction on the ground that it is no longer in the "public interest." It is difficult to see why any parties would enter into consent decrees if their ability to claim the benefits of settlement would depend entirely on some future court's view of what the public interest requires.[7]

5. In No. 92-879, Petitioner BellSouth has raised a question implicating separation of powers principles. Plenary review of that question would be inappropriate for several reasons.

a. The question was not raised or decided in the court of appeals. BellSouth concedes in its petition that "[i]n the court of appeals, neither BellSouth nor the other BOCs interposed express constitutional objections" to the application of Section VIII(C). Petition for Certiorari in No. 92-879, at 13. Absent exceptional circumstances not even remotely present here, this Court will not consider issues a party has failed to raise below. *See Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Youakim v. Miller*, 425 U.S. 231, 234

[7] It is well established that the United States has no entitlement to decree modifications that *increase* the burden on restricted parties over their objection merely because the public interest, or "purpose of the decree" would be better served. *E.g. Atlantic Refining*, 360 U.S. at 23-24. That is because restricted decree parties are entitled to the benefit of the bargain when they entered into the decree.

(1976). That the question presented involves issues of constitutional law does not alter this Court's normal requirement. *See, e.g., Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 n.23 (1989).[8]

b. BellSouth has not presented any substantial separation of powers issue. This case involves the interpretation of a standard of review established by the parties in the decree itself. Petitioners are *not* challenging the "public interest" standard which governs the modification of consent decrees when all parties agree and no other standard is specified by the decree; *nor* are petitioners challenging the *Swift* standard which often applies to modifications of consent decrees when one party opposes the modification and no other standard is specified. The only issue is the application of the "no substantial possibility" standard in Section VIII(C) of this particular consent decree. Thus, this is not a case in which the courts have "arrogated" anything to themselves. They have simply interpreted the intent of the parties to the MFJ, including the United States, as to what standard of review should apply to contested requests for modification.

Indeed, Section VIII(C) limits the judiciary's power as compared to traditional equitable principles, and in-

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[8] BellSouth rests its entire claim for review on a footnote to the *government's* brief which did no more than note a possible constitutional concern. *See* Br. for United States at 22 n.34. This falls far short of what is required. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, the government's footnote does not discuss the issue which BellSouth now raises. The footnote addressed the proper interpretation of the traditional "public interest" standard, not the appropriateness of the court's enforcement of Section VIII(C) based on AT&T's objection. BellSouth seeks to transform the mention of the words "separation of powers," embedded within two sets of parentheses in a footnote in another party's brief, into a license to raise any separation of powers argument that it wishes in this Court.

creases that of the United States, in situations such as the instant case. Under traditional equitable principles, the rigorous *Swift* standard would apply to the BOCs' proposed decree modification. Thus in cases such as this where the United States consents and another party objects, Section VIII(C) provides *more* flexibility and a less rigorous test for modification than would the *Swift* test.

In any event, the issue BellSouth seeks to raise is not of constitutional magnitude. BellSouth attempts to reformulate *United States v. Swift & Co.*, 286 U.S. 106 (1932), as a constitutional decision requiring different rules for consent decree modification when the United States is a party. Petitioners admit, however, that *Swift* does not "address the issue in constitutional terms." Petition in 92-879, at 16.[9] There is simply no warrant for converting questions about the proper standard of review for proposed modifications of consent decrees into a constitutional question of separation of powers, particularly when the courts have done no more than interpret the parties' intent with respect to the proper standard.

None of the structural concerns that raise potential separation of powers problems is present here. The district court did not bestow prosecutorial power on AT&T, or undertake a prosecutorial function itself. *See Morrison v. Olson*, 487 U.S. 654, 695 (1988). Nor does the present case pose any danger that the balance of power between the branches will be disrupted. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977). The district court has not acquired any administrative or executive functions which might affect its independence. *See Buckley v. Valeo*, 424 U.S. 1, 123 (1973).

In short, there is no way the judicial branch can impermisisbly undermine the Executive's powers by enforc-

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[9] Petitioners describe the "constitutional underpinnings" of *Swift* as "unstated, but compelling." Petition in 92-879 at 17.

ing a decree provision to which the United States expressly consented.

CONCLUSION

The Petitions for Certiorari should be denied.

Respectfully submitted.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONERS

In its response to the Bell companies' petition for a writ of certiorari, the United States agrees that this case has many characteristics that make it certworthy under traditional standards. The United States clearly states (Br. 13) that the "court of appeals erred by holding that Section VIII(C) of the decree, rather than the public interest standard, governs BOC motions to modify line-of-business restrictions that are supported by the government, if AT&T objects." The United States acknowledges (Br. 18) that "the decree at issue significantly affects competition and innovation in telecommunications and related industries" and that "unnecessary restrictions on vertical integration and entry into important and technologically critical markets may undercut the public interest in competition." The United States also confirms (Br. 2-3, 18-19) that a number of waiver requests significantly affecting competition in these "critical markets" have arisen in the past and are likely to arise in the future. The United States further declares that AT&T "has an economic interest" in opposing these waiver requests because it will "benefit from the anticompetitive effects of continuing restrictions on BOC entry that no longer serve the public interest in competition" (Br. 16), that the choice between the public interest standard and the more stringent test of Section VIII(C) may well be "determinative" of those waiver requests (Br.

19 n.16), and that Supreme Court "review of the question presented"—which concerns the standard for modification—"might be warranted in some future case" (Br. 20).

Nonetheless, the United States is "not persuaded" that review of the question presented is necessary at this time. Br. 13, 17. The reservations expressed by the United States, however, are insubstantial. They do not detract from the compelling need for review by this Court at this time. Nor do the more extreme and self-interested arguments presented by AT&T and MCI provide any reason to delay review of this compelling and important question of antitrust consent decree jurisprudence.

1. The United States explains in some detail (Br. 13-17) why the decision below is both wrong and important. Under established legal principles incorporated in this decree, if both the United States and the antitrust defendants subject to a restriction consent to a modification of that restriction, the district court must accept the modification provided it falls within the reaches of the public interest. The posture of this particular case—in which the pre-decree defendant has been split into parts, with different post-divestiture obligations under the decree—does not change those established principles. Consent is still a matter between the United States and the parties bound by the restriction.

Here, as the United States notes (Br. 15), "[o]nly the BOCs are bound by [the line-of-business] restrictions; post-divestiture AT&T is not so bound and, indeed, competes in markets from which the decree bars the BOCs." It follows that only "the BOCs —and not AT&T—stand in the position of the antitrust defendant for purposes of determining whether a modification of the restrictions applicable to them is consensual." *Ibid.* Certainly, nothing in the language or history of the decree indicates otherwise. In particular, "[t]here is no evidence that the government or the pre-divestiture Bell System (which included the BOCs) desired to afford post-divestiture AT&T special rights to oppose modification of restrictions that did not apply to it, much less evidence that there was a meeting of the minds on the point." *Id.* at 16. To the contrary, the United States would never have agreed to the decree if AT&T had been given such an extraordinary veto power. See Pet. 21. Because AT&T has an "economic interest" in maintaining the restrictions, granting AT&T the ability to block modifica-

tions that the United States concludes are pro-competitive would interfere with the ability of the United States to "represent[] the public interest in competition in government antitrust proceedings." U.S. Br. 16-17.[1]

Despite this strong argument for review, the United States suggests (Br. 17) that the court of appeals' holding may not be certworthy because it is "based squarely on its interpretation of the terms of the MFJ" and thus "establishes no clear precedent for other multiparty decrees." That is not correct. As the United States itself acknowledges (Br. 13-14, 16 n.15), although the court of appeals purported to base its decision on sections III and VII of the decree, neither section III nor section VII says anything "about the standard governing decree modifications." Both provisions are

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[1] The cases cited by AT&T (Opp. 17-18 nn.15-16) to support its supposed veto power are not on point. All but one involved efforts by the Department (or other decree parties) to *increase* decree restrictions on a defendant over the express objection of that defendant. See, *e.g.*, *United States Gypsum Company* v. *United States*, 352 U.S. 457 (1957); *Ford Motor Co.* v. *United States*, 335 U.S. 303 (1948); *Chrysler Corp.* v. *United States*, 316 U.S. 556 (1942); *United States* v. *International Harvester*, 274 U.S. 693 (1927); *United States* v. *RCA*, 46 F. Supp. 654 (D. Del. 1942). None of these cases has any bearing on the standard of review in cases where both the government and the defendants subject to a particular restriction agree that it should be modified or removed.

The only case remotely on point is *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502 (1941), which supports the position taken by the United States and the Bell companies. In that case, the defendant agreed to a consent decree forbidding it to engage in predatory conduct against Panhandle Company and expressly granting Panhandle a right to intervene to enforce that commitment. Subsequently, the government and the defendant agreed to modify the decree and the district court granted the modification without permitting Panhandle to be heard. The Supreme Court held that Panhandle had "standing" to argue against the modification in district court (*id.* at 508). Significantly, however, the Court went on to state that the "public interest" test would apply to the modification on remand, notwithstanding Panhandle's objection (*id.* at 509). Thus, it is clear that mere *standing* to object does not affect the public-interest *standard* of review when both DOJ and the party subject to the restriction agree to its modification. See Pet. 9 n.6.

simply standard boilerplate in consent decrees. See Pet. 9 n.5. Not a word in either suggests that each party is given veto power over modification of the separately enforceable rights and obligations of distinct parties. AT&T's power to act as spoiler arises, according to the court, solely because of its status as a decree party—a status it shares with thousands of other parties to consent decrees who might find it in their private interest to obstruct modifications in consent decrees applicable to other defendants.[2]

Thus, the decision below would plainly apply to "other multi-party decrees." The federal government regularly enters into multi-party decrees not just in antitrust cases, but in such other contexts as civil rights, environmental enforcement, and pension litigation. See Pet. 16 n.11. Under the majority's reasoning in this case, every modification agreement between the government and an enjoined decree party could potentially be subject to an effective veto (through an elevated standard of review) by other parties.[3]

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[2] AT&T suggests (Opp. 14) that the proposed modification would "infringe" upon its specific rights under the decree by "adversely affect[ing]" the value of assets that AT&T received at the time of divestiture. That argument is baseless. None of the interexchange assets that AT&T was given at divestiture will be transferred as a result of the proposed modification. What AT&T is really saying is that it has a reliance interest in decree restrictions that have come to favor it at the expense of its competitors. But no one can reasonably rely on restrictions in a dynamic decree that was intended to be modified in light of market and technological developments. See *United States* v. *Western Elec. Co.*, 900 F.2d 283, 296 n.13 (D.C. Cir. 1990) (*Triennial Review Opinion*). In this respect, AT&T is in the exact same position as MCI or any other industry incumbent seeking to block new competitive entry.

[3] AT&T suggests (Opp. 16) that it would not be able to block "truly procompetitive line-of-business modifications" because relief is available under section VIII(C). See also MCI Opp. 9. But section VIII(C) requires the BOCs to prove, not just that the relief is procompetitive and in the public interest, but also that there is "no substantial possibility" that they could "impede competition" in the market they are seeking to enter. The question of the proper standard of review only arises when, as here, the Department of Justice has concluded that a modification is procompetitive and in the public interest, but the district court (per Judge

In any event, even if the United States were correct, and the holding below were limited to this particular decree, with no ramifications beyond it, certiorari would still be warranted because of the extraordinary public importance of this decree. The MFJ controls most aspects of the telecommunications industry—an industry that constitutes the nerve center of the U.S. economy. The fate of this industry will help determine the Nation's technological competitiveness well into the 21st Century. Yet, if the decision below is allowed to stand, future developments will be held hostage to AT&T's narrow competitive advantage. The consent decree will have been turned into a massive instrument of protection for the benefit of the industry giant, against new competition and new technologies.[4]

2. While not disputing the fundamental importance for the U.S. economy of the proper interpretation of this decree, the United States suggests (Br. 17) that in two respects "the scope of the court of appeals' ruling is unclear" and, therefore, may not be as harmful as initially appears. First, the United States notes (Br. 17-18) that the court below "limited its holding to the modifications of the decree's line-of-business restrictions, expressly declining to decide what standard would apply to modifications of other provisions." But this is a limitation without significance. All the important questions concerning modification of the decree relate to the line-of-business restrictions. It is precisely here—where AT&T dominates markets from which the Bell companies are excluded—that the decision below matters. Section II(D), which contains the line-of-business restrictions, is the battleground

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Harold Greene) has concluded that the more stringent test of section VIII(C) has not been met. The difference in standards, as DOJ points out (Br. 19 n.16), will often be outcome-determinative.

[4] MCI argues (Opp. 8-10) that AT&T is entitled to "the benefit of [its] bargain" even if the result is anticompetitive. But as already noted (pp. 2-3, *infra*; Pet. 19-23) neither the language nor history of the decree suggests that AT&T managed to extract such a Faustian compact from the United States.

on which AT&T continuously fights to protect its competitive turf.[5]

Second, the United States points out (Br. 18) that the instant case involves a BOC motion to modify the decree that was supported by the United States. The United States suggests (*ibid.*) that the court of appeals might still "hold the public interest standard applicable where the United States moves under Section VII for a line-of-business modification (sought or consented to by the BOCs)."

We wish this were true, but it seems to be merely what Samuel Johnson (speaking of second marriages) called "the triumph of hope over experience." The court below, in fact, specifically foreclosed any suggestion that the result would have been different if the single word "movant" had replaced "supporting respondent" on the government's brief. The court held that "if AT&T opposes a line-of-business modification, then DOJ's support, *in whatever form*, does not relieve the Companies from meeting the section VIII(C) test." Pet. App. 15a (emphasis added). In explaining this holding, the court cited two prior cases, in one of which DOJ offered merely "support for the proposal," while in the other DOJ "formally moved for a waiver." *Ibid.* In both cases, AT&T's opposition was deemed sufficient "to trigger the more stringent section VIII(C) standard." *Ibid.*

In short, there is no point in waiting for another D.C. Circuit decision to decide whether the holding below will "significantly impede the government's ability to carry out its responsibility to

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[5] MCI also argues that the petition is premature, but for a different reason. MCI suggests (Opp. 7) that a preliminary question—whether the public interest standard applies even if all parties, including AT&T, support the modification—may still come before the Court. But the affirmative answer given to that question by the court of appeals is so obviously correct and in line with established precedent (see Pet. 21-22), that this Court has already twice declined MCI's invitation to review it, see *MCI* v. *United States*, 111 S.Ct. 283 (1990); Order, *American Newspaper Publishers Ass'n* v. *United States*, No. A-267 (Oct. 30, 1991), and will undoubtedly do so a third time when the six-year information services proceeding is finally brought to a close.

ensure that the decree serves the public interest in competition." U.S. Br. 18. The last shoe has already dropped, whether the United States has heard it or not.[6]

3. Finally, the United States suggests (Br. 13, 18-19) that there is no "pressing need at this time" for review of the question presented because the underlying waiver request itself is "of limited practical importance in comparison with the other issues that may arise under the decree." Should the issue arise again in a more important context, as where the United States seeks to remove the equipment manufacturing restriction, then, the United States says (Br. 18-19), "an issue warranting review by this Court might be presented."

But the importance of a legal question is not dependent on the specific context in which it arises. This Court is being asked to decide the standard of review for *all* waiver requests—from the minor to the earth-shaking—that are supported by both the restricted party and the United States. The Court is not being asked to review the competitive merits or practical implications of the CCS waiver. The United States admits that the legal question is significant enough to warrant review—sometime. But since the issue was fully briefed and decided below by the only court that has jurisdiction over the MFJ, and since resolution of the issue has nothing whatever to do with the specifics of the particular waiver

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[6] By contrast to the United States and MCI, AT&T makes a sort of "laches" argument, suggesting that the United States and the Bell companies have already waited too long to raise this issue under the decree. AT&T Opp. 14-15. But the court of appeals had expressly left this question open in its *Triennial Review Opinion*, 900 F.2d at 294 n. 12, as AT&T itself is forced to acknowledge. AT&T Opp. 8 n.8. The court of appeals has now decided the issue on the merits (Pet. App. 13a-24a), and it is ripe for review in this Court.

Equally meritless is AT&T's contention (Opp. 21) that Supreme Court review should be denied because the Bell companies did not seek *en banc* review in the D.C. Circuit. *En banc* review is not a prerequisite to Supreme Court review and was not practicable here in any event, since Rule 35(a) of the Federal Rules of Appellate Procedure requires a majority vote of all active judges regardless of recusals.

request, denial of certiorari will only prolong the error and perpetuate the anticompetitive effects of the decision below. Nothing is to be gained by waiting for a more "important" waiver request.[7]

Since the decree's implementation in 1984, there have been literally hundreds of requests to modify the decree or grant waivers of the line-of-business restrictions. Because of elaborate briefing and protracted processing by the Department of Justice, these requests typically take years even to reach the district court. Additional years of judicial review are then required. Years may expire before this issue reaches this Court again in another context.

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[7] It is ironic that AT&T, which has at every step fiercely resisted the requested relief, now states (Opp. 12) "that the underlying dispute has little practical significance." In any event, not even AT&T suggests that the specific modification at issue here is moot. There are still numerous LATAs, particularly in rural areas, where the Bell companies do not plan to install CCS facilities, because to do so would be prohibitively expensive. The ruling below will deny the customers in those areas access to the advanced services that CCS makes possible. Moreover, even in LATAs with CCS facilities, interexchange carriers will be denied the opportunity to receive CCS messages on a centralized basis. See *Memorandum of the United States* at 2 (D.D.C. May 12, 1989) (C.A. J.A. 672) (The construction and operation of CCS facilities in every LATA "would impose substantial inefficiencies and unnecessary costs on interexchange carriers—especially smaller carriers—as well as the BOCs, thereby hampering the implementation of * * * CCS and its attendant public benefits.").

AT&T argues (Opp. 22) that "transitional waivers" could solve all these problems. But the United States made a considered judgment that piecemeal relief would embroil the parties and the courts in a great deal of delay and wasteful litigation over case-by-case waivers and would be less effective than a general waiver in achieving vigorous competition and economic efficiency. *Memorandum* at 23 (C.A. J.A. 693). Moreover, AT&T's proposal does not even address the plight of smaller interexchange carriers. AT&T's insistence on a form of waiver that is most beneficial to it and least conducive to effective competition is a telling reminder of why the Department of Justice rather than AT&T must be entrusted with the responsibility for protecting the public interest under this antitrust decree.

Meanwhile, the Department of Justice and the lower courts will be applying the wrong standard and a huge amount of potential new competition will be held hostage to AT&T's opposition. Only this Court will be able to correct the error and then only after lengthy delay and significant uncertainty and dislocation in the industry.

In a high-tech industry like telecommunications, delays of this sort are competitively devastating. AT&T knows that it cannot keep the Bell companies out of its markets indefinitely. Its goal is delay, and if the Court waits for another case to correct the court of appeals' erroneous decree interpretation, AT&T will have achieved all it could hope for. A vivid example is provided by the Bell companies' pending waiver to provide mobile services across LATA boundaries. AT&T, through its planned acquisition of McCaw, will be a direct competitor of the Bell companies in this field. AT&T is not bound by the LATA restrictions and is trying to block relief for the Bell companies to retain a competitive advantage. So far, AT&T is succeeding. Although it was filed in December 1991, that waiver is still mired in proceedings before the Department of Justice, despite the fact that the Department has been on record favoring this relief since 1987. Judge Greene has previously expressed his opposition to the requested relief; thus, if the VIII(C) test—which gives wide latitude to the district court—is applied, lengthy further delays are likely in the courts, all to the detriment of consumers who would benefit from head-to-head competition.

Absent this Court's intervention, the decision of the D.C. Circuit—which is the only court of appeals with jurisdiction over MFJ issues—"will have a debilitating effect" (*Parker* v. *Flook*, 437 U.S. 584, 587 (1978)) on the telecommunications industry and impair the sound and efficient administration of the decree. As the United States itself observed in 1982, when calling for prompt affirmance by this Court of the original decree, uncertainty about the decree would have "a broad and significant adverse impact on the telecommunications industry, on related industries * * * and thus on the public in general." *U.S. Motion to Affirm* at 12, *Maryland* v. *United States*, No. 82-952 (Dec. 22, 1982).

When all is said and done, the United States refrains from recommending that certiorari be granted because of its fanciful

hope that the court of appeals will effectively overrule its decision by making the standard of review turn on whether the government is a movant as opposed to a supporting respondent. Since there is no basis for that hope, there is no basis for delaying further review, at great cost to the development of competition in this critical industry. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 92-848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERITECH CORPORATION, *et al.*,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICI CURIAE OF CITIZENS FOR A SOUND ECONOMY FOUNDATION, *ET AL.*, IN SUPPORT OF PETITIONERS

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BRIEF AMICI CURIAE OF CITIZENS FOR A SOUND ECONOMY FOUNDATION, *ET AL.*, IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the Rules of the Court, *amici* submit to urge reversal of the decision below of the United States Court of Appeals for the District of Columbia Circuit on the ground that the court misconstrued the consent decree at issue and thus did not apply the public interest standard in determining whether there should be modification of the decree

that governs the critically important telecommunications industry.[1]

INTERESTS OF AMICI CURIAE

Amici consist of two groups: (1) disinterested non-profit consumer groups and (2) disinterested academics and telecommunications experts. The latter are Henry Geller, a Duke University professor and communications fellow at the Markle Foundation; Dr. Everett Parker, senior resident associate at Fordham University, and Dr. Barbara O'Connor, a professor who serves as Chair of the Alliance for Public Technology and the California Educational Technology Committee.

Group 1 is an *ad hoc* group of public-interest organizations concerned with the public interest in telecommunications services from the perspective of the residence, people with disabilities, minorities, and other non-profit interests. It has the following groups:

1. *Action for Children's Television* (ACT) is a twenty-year-old, non-profit, tax-exempt membership organization devoted to improving access by children to television and telecommunications programs and services in the United States. ACT has frequently participated before the Federal Communications Commission in regulatory proceedings on behalf of the interests of children in both television and telecommunications matters. ACT is deeply concerned about the potential educational and entertainment value of information

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[1] Counsel for both Petitioners and Respondents have consented to the participation of *amici* in this case, as evidenced in letters filed with the Court. We rely upon Petitioners' brief for the Statement and related preliminary sections.

age services, and that there be affordable access to those services from a diversity of sources. Peggy Charren is President of Action for Children's Television.

2. *American Council of the Blind* is the nation's leading membership organization of blind and visually impaired people. It was founded in 1961 and incorporated in the District of Columbia. The Council's membership numbers in the tens of thousands. The majority of its members belong to one or more of its 71 affiliated organizations. The Council serves to improve the well-being of all blind and visually impaired people. The blind and sight-impaired populations historically have been underserved by technological developments, and are concerned that the telephone network and services offered through the network are fully accessible by all users.

3. *Black Citizens for a Fair Media* (BCFM) is a nonprofit association with 200 members concerned about the role of black Americans in telecommunications. BCFM members use telecommunication services and equipment and are interested in promoting an equitable distribution of telecommunications technology and services to citizens of all income levels, religions, and races.

4. *Church Federation of Greater Chicago, Office of Communications* is composed of 23 communions with more than 3,300 congregations in its membership. The Office of Communications is responsible for the communications and public relations functions of the Federation. The Office of Communications is interested in ensuring that the benefits of technological innovation in telecommunications service be distributed throughout all sectors of society in a fair manner.

5. *Citizens for a Sound Economy Foundation* (CSE Foundation) is a non-profit 501(c)(3) educational institution. With an active membership of 250,000 members, CSE Foundation promotes initiatives that foster economic growth and enhance the quality of life for its members and all consumers.

6. *Consumer Interest Research Institute* (CIRI), a non-profit corporation organized in 1981, prepares analyses of public policies for a variety of consumer groups on issues pertaining to information services and financial services. As a result, CIRI is uniquely situated to analyze the impact of the information services restrictions on consumer groups. Moreover, CIRI has a direct interest in the proceedings before this Court in that the MFJ's restrictions directly impact the consumer groups for which CIRI analyzes public policy. Since CIRI's intervention in 1987, it has published several materials on related issues, particularly the monograph, *The Consumer Interest in Telecommunications Infrastructure Modernization*, by CIRI President Mary Gardiner Jones, for presentation at the 5th Conference on New Directions for State Telecommunications Regulations, January 21-24, 1990, Salt Lake City, Utah. In past years, CIRI has been supported by the following foundations and corporations: The Benton Foundation; The Commonwealth Fund; The Direct Selling Education Foundation; Ford Motor Company; The John D. and Katherine T. MacArthur Foundation; The John and Mary R. Markle Foundation; MCA Foundation; Safeway Stores, Inc.; The Shell Companies Foundation; Philip M. Stern Family Fund; and the Sloan Foundation.

7. *Consumer Research Foundation* (CRF) is a California-based, non-profit research foundation con-

cerned with analyzing issues from a consumer perspective for consumer organizations. CRF President Helen Nelson is a Founder and Past President of the Consumer Federation of America. CRF has studied telecommunications issues from a consumer perspective for a number of years. Ms. Nelson serves on the consumer advisory panel for Pacific Bell, and submitted testimony before the National Telecommunications and Information Administration in its Telecommunications Infrastructure Inquiry.

8. *Council of Chief State School Officers* is a nationwide non-profit organization of the 57 public officials who head the departments of elementary and secondary education in the fifty states, five U.S. extra-state jurisdictions, the District of Columbia, and the Department of Defense Dependents Schools. It has functioned as an independent national council since 1927, and has maintained a Washington office since 1948. Since 1908, chief state school officers have conferred with the federal government "to consider educational interests common to all the states . . . which might presumably be furthered by a free comparison of views."

9. *National Association For Better Broadcasting* (NABB) is a non-profit, educational organization of users of telecommunications services and equipment founded in 1949 to promote the highest standards for radio and television service to the public. With approximately 300 members, NABB represents the interests of citizens employed in the fields of law, sociology, education, mental health, religion, and other professions, as well as the interests of parents and other citizens, all of whom use telecommunications services and equipment. The availability and afford-

ability of telecommunications services to NABB's members is directly affected by the MFJ's restrictions.

10. *National Council of Silver Haired Legislators* (NCSHL) is a non-profit organization of current or past silver haired legislators or senior legislators or whatever term is used in a state having a quasi-legislative body composed of seniors age 60 and over, who generally were elected by their peers. There are approximately twenty-four states with Silver Haired Legislatures. NCSHL provides technical assistance to those states contemplating formation of their own Silver Haired Legislature. NCSHL promotes legislative awareness and advocacy among citizens 60 years of age or over.

11. *The National Indian Youth Council, Inc.* (NIYC) is an Indian rights organization founded in Gallup, New Mexico in 1961. It is Indian conceived and Indian operated. Headquartered in Albuquerque, New Mexico, NIYC is a nationwide organization. Its members also use telecommunications services and equipment. NIYC has a particular interest in promoting access to telecommunication services in remote areas, especially Indian reservations. Recently, NIYC hosted a regional hearing with NTIA on the telecommunications infrastructure.

12. *Northeast Independent Living Program, Inc.* (NILP) is a non-profit 501(c)(3) Massachusetts corporation. NILP strives to be a consumer controlled Independent Living Center providing advocacy and services to the cross disability population who wish to live as independently as possible within the Merrimack Valley. Affordable and accessible telecommunication services are essential tools to achieving these

results. NILP's funding is primarily from governmental and foundation sources.

13. *Telecommunications for the Deaf, Inc.* (TDI), established in 1968, is a non-profit, 17,000 member consumer organization supporting technology in the field of visual communications for the hearing impaired population. TDI functions as an information resource for consumers, businesses, and regulatory agencies, and offers a link to manufacturers of products involving visual technology. The organization annually publishes the International Telephone Directory for TDD Users, and a quarterly newsletter concerning developments in visual technology. TDI members have a special interest in accessibility of the telephone network and of technology, and the potential of that technology to enhance the quality of life of its members.

14. *World Institute on Disability, Inc.* (WID) is a public policy center run by persons with disabilities. WID was established to combat "handicappism." Its goal is to use research, public education, training, and model program development as a means to create a more accessible and supportive society for all people—disabled and non-disabled alike. WID has been deeply involved in fostering accessible and affordable telecommunications services. It has created a Blue Ribbon Telecommunications Panel of leaders from the disability community to evaluate current initiatives and technology and make recommendations regarding the future of this burgeoning industry and how it serves people with disabilities. WID was granted intervenor status for the purpose of appealing the Court's initial decision, and has participated before the FCC and

other regulatory agencies on behalf of Americans with disabilities.

Amici have participated in proceedings involving the Modified Final Judgment (MFJ)[2] because of their interest in promoting the fullest and most effective contribution by the public switched telephone network to (1) improved productivity for U.S. industries in this era of global competition, and (2) the quality of life for all Americans in the emerging information society. The public switched network is of the greatest importance in both respects because it is ubiquitous, universal, and uniform.

Amici strongly support open entry and full competition in the telecommunications field, including at the local level, and believe that governmental policy should not only permit such entry but should facilitate it with effective interconnection and other policies. But *amici* also strongly believe that the public switched network, subject to appropriate safeguards, should be allowed to make a maximum contribution to the welfare of the American people. The local Bell Operating Companies (BOCs) represent the bulk of the public switched network, with over 80 percent of the nation's access lines. Indeed, they represent over one-half of the entire U.S. telecommunications industry. It makes no sense to "park out" such an important segment of this vital industry—yet that is precisely what the MFJ is doing today.[3]

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[2] See *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. *Maryland* v. *United States*, 460 U.S. 1001 (1983).

[3] See, e.g., U.S. Dept. of Commerce, *The NTIA Infrastructure Report: Telecommunications in the Age of Information*, at 213-14 (1991).

Thus, the BOCs cannot make an effective contribution to distance-learning education or to the development of new videotex or similar information services, even though those services would especially benefit the deaf or blind. This telecommunications anomaly results from the fact that the MFJ, which prevents the BOCs from offering services that cross LATAs, forces the BOCs to place complex, expensive computing centers in each LATA.[4]

In addition, because of the manufacturing restriction, the BOCs cannot design, or participate effectively in the development of, telecommunications devices, such as a "tele-mailbox," which might greatly promote the spread of videotex or other information services. Again, these services would especially benefit those with disabilities. The manufacturing restriction has also resulted in inconsistent interpretations, such as allowing BOC participation in software, but not in software associated with telecommunications equipment, often called "firmware" (software that has been placed on a chip). Indeed, we stress that the full effect of the restriction, while very significant, cannot be assessed because it inhibits so much R&D development.[5]

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[4] See 4a-5a, Pet. Br. App., for a description of the LATA concepts (164 local exchange areas).

[5] Thus, while most "high-tech" companies spend eight to nine percent of their total revenues on R&D, the BOCs collectively spend only 1.3 percent. See Statement of Mr. J.L. Clendenin, Chairman of BellSouth Corp., before the Senate Subcommittee on Communications, April 25, 1990, at 15.

Amici therefore have a great interest in a construction of the MFJ that facilitates its modification when the public interest, as evidenced by the position of the lead agency in the competitive arena, the Department of Justice (DOJ), so requests. The construction endorsed by the lower court wholly frustrates that aim.

SUMMARY OF ARGUMENT

The provisions of the decree are not unambiguous. Therefore, they should be construed in light of the decree's clear history and purpose. That critical background establishes that the restrictions stemmed solely from DOJ and were not intended in any way to benefit AT&T. Indeed, at the time the MFJ was formulated, AT&T had a fiduciary duty to all its stockholders to try to avoid or temper the restrictions. It is therefore inconceivable that the DOJ would afford AT&T any decisive role in choosing the modification standard and therefore the ability to block a future modification that DOJ believed would serve the public interest.

Experience has shown that the adoption of the proper standard for modification makes a great difference. The lower court's action endorsing an erroneous construction of the decree therefore has the most serious consequences for the nation's information infrastructure and raises an issue of the utmost importance in the area of global competition and the information society.

ARGUMENT

I. The MFJ can and should be construed so as to make the DOJ the focal point for its modification and thus to facilitate that modification when DOJ concludes that the revision would promote the public interest.

A. The critical background establishes that, if possible, the decree should be construed along the above lines.

The MFJ is a contract between two contesting parties. However, as shown by the Tunney Act requirements, that contract is impressed with the public interest.[6]

The public interest standard governs whether the district court should enter an agreement regarding the MFJ. Moreover, where there is a future agreement as to a modification, the standard governs whether that agreement should be accepted. The critical issue in this case is whether, regarding the BOC restrictions, that future agreement must include AT&T. We submit that the background to the MFJ indicates that it should not.

First, the BOC restrictions stemmed solely from DOJ, and were in no way meant to benefit the future AT&T. This was made clear by AT&T in the Tunney Act proceedings.[7] In addition, AT&T Chairman Charles Brown stated that he was forced by circumstances to accept DOJ's "coherent theory . . . to separate the Bell System's competitive operation from those they considered to be a natural monopoly . . .

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[6] See *United States* v. *American Tel. and Tel. Co.*, *supra*, 552 F. Supp. at 147-153.

[7] See Pet. Br., at 21, n. 19; App. 37a.

its local exchange services. . ."[8] This "clean" but "painful" solution resulted not only in divestiture of the BOCs but also the imposition of the BOC restrictions, because DOJ viewed the BOCs as "natural monopolies." That the restrictions stem solely from DOJ's theory of the case is shown not only by the three core restrictions (interexchange, information services, and manufacturing) but the final "catch-all" that the BOCs were not to "provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly actually regulated by tariff."[9]

While the foregoing is conclusive on this point, there is a further consideration establishing that AT&T did not seek these restrictions in order to benefit its future operations—namely, that AT&T then had a fiduciary duty to all its shareholders, including those who would become BOC shareholders, to obtain the best possible deal. See 20a; *United States* v. *American Tel. & Tel. Co.*, *supra*, 552 F. Supp. at 220-21. It could not propose stringent restrictions on the BOCs such as the line-of business constraints. If DOJ insisted, it could only acquiesce in them as the "best deal" possible for its shareholders, including those of the soon-to-be divested BOCs.[10]

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[8] Statement of Chairman Brown, at 4-5, *Disconnecting Bell*, H.M. Shooshan III, Ed., Pergamon Press, N.Y. 1984.

[9] See *United States* v. *American Tel. and Tel.Co.*, *supra*, 552 F. Supp. at 228.

[10] Suppose that instead of leaving the matter in an ambiguous state (see point 2, *infra*), DOJ had drafted a provision stating that if it acquiesced in a BOC proposal to modify one of these restrictions, that would be sufficient to make the public interest standard of Section VII applicable. AT&T could not and would

Thus, the situation plainly is as follow:

(i) The restrictions stemmed solely from DOJ.

(ii) They were not intended to benefit AT&T in any way.

(iii) In this dynamic field, it was recognized that the provisions might have to be modified in light of changed competitive conditions.

(iv) DOJ, as the guardian of competition, would want to facilitate such modifications of the restrictions as it found to be warranted in the public interest (C.A. Br. 27-28). DOJ clearly would not want to give a blocking role to AT&T, a decree party that, like MCI or Sprint, in the future would have a fiduciary duty to its stockholders to raise all conceivable objections to BOC competition in its primary businesses of interexchange service and manufacturing.[11]

(v) It follows that in light of this background, if it is at all possible, the decree should be construed in a common sense way so as not to afford AT&T, the

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not have objected, asserting that its consent was also necessary and that it had the right to bring the matter under the more stringent test of Section VIII(c). That would have been unconscionable—a clear breach of AT&T's fiduciary duty to its then stockholders.

[11] There is a further consideration here. It is widely believed that at some point the BOCs will invade each other's territories, most likely in alliances with other entities such as cable television, cellular, or alternative access carriers. If they do so, and require some modification of the MFJ to be able to provide more effective competition, that proposed modification, if it is supported by DOJ, should be judged under the public interest standard. The BOC being subjected to competition should not have the option to invoke the more stringent Section VIII(c) test. See dissenting opinion, App. 35a.

dominant firm in the interexchange and manufacturing markets, a blocking role. Rather, the decree should make DOJ the focal point for competitive assessment of any modification in the public interest.

B. The decree provisions are ambiguous and therefore can and should be construed along the above lines.

The court below found resort to this background history of "little use" (App. 20a). It could do so if—no matter how clear that background is—the decree provisions unambiguously gave AT&T the right, by withholding its consent, to invoke the VIII(c) test as to any BOC modification of these restrictions rather than the public interest standard. This obviously would be a colossal blunder on the part of DOJ. Unless and until the decree were modified, however, the courts must follow such unambiguous provisions. And the court below did find that AT&T's right in this respect "is not ambiguous" (App. 22a). We urge that this crucial finding is in error.

We recognize that DOJ did err in not specifically dealing with this issue in the decree. We also recognize that DOJ and the parties failed to focus on the issue during the first Triennial Review proceeding (so naturally neither did the court in its review). See App. 23a; 40-41a. It is only with this case that the issue has been presented to the courts. We therefore urge that the issue should and must be resolved based upon the language of the decree.

The sections relied upon by the court below are Section III ("Applicability and Effect"), making the provisions applicable to successors, and Section VII ("Retention of Jurisdiction"), retaining the jurisdiction of the district court for enforcement or modifi-

cation. While the sections clearly bestow rights and duties on the parties, they do not deal with the critical issue of the right of a AT&T or a BOC (see n.11, *supra*) to invoke Section VIII(c) by withholding its consent to a modification that is agreed to by DOJ, and that does not place any restriction on them and was not designed to benefit them. The dissenting opinion (App. 30a-39a) cogently develops this critical point, and no useful purpose would be served by repeating that analysis. It establishes, we believe, that the only sensible decree construction is that urged by DOJ.

C. The issue is one of the greatest importance to the nation because the proper construction of the decree greatly affects the future development of the vitally needed telecommunications industry.

It may be argued that there is no need to take up this issue because, in the future, DOJ will be more careful in drafting the modification provisions of such multi-party decrees. That may be true. However, as we have shown, the proper implementation of *this* decree is of the greatest importance to the nation. It governs the vital telecommunications industry and affects the ability of that industry to respond quickly to dynamic technology and thus to make a maximum contribution to improved productivity of all our industries and to the quality of life of the American people. On this ground alone, review is warranted by this Court.

Finally, it makes a great difference whether the applicable standard for judging the proposed modification in cases such as the instant one is Section VII or Section VIII(c). Under Section VII, changes are granted "if within the reaches of the public inter-

est"—that is, unless they are "certain to lessen competition . . ." (App. 9a). Under Section VIII(c), the standard is much higher for relief. Cf. *United States* v. *Western Electric Co., Inc.*, 529 F. Supp. 846, 868 (D.D.C. 1984). Thus, the court below pointed out that it affirmed ". . . the district court's refusal to lift the decree's ban on the BOCs' manufacture of telephone equipment [under VIII(c)] . . . but reversed a similar refusal to all the Companies to provide information services [under Section VII] . . ." (App. 13a-14a). The court further stated (App. 23a) that ". . . *but for* AT&T's opposition, we would have reversed and remanded the manufacturing portion of *Triennial* just we did the information services portion" (emphasis in original). It thus appears that the manufacturing provision would be gone today, in light of the importance given the DOJ position under the public interest test of Section VII. So also, we believe, would there have been an entirely different result in this case.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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